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No. 87-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that a layman, filing an administrative charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., is required to satisfy the requirements of Article III standing, in order to have that charge investigated and processed by the Equal Employment Opportunity Commission.

2. Whether the Court of Appeals erred in holding that a black employee does not have standing to file an administrative charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., complaining that the employer discriminates against black applicants for

employment on the basis of race, where the discrimination against applicants artificially lowers the number of black persons in the workforce, and deprives the employee of a nondiscriminatory work environment.

3. Whether the Court of Appeals erred in holding that a black employee does not have standing to litigate, in federal court, a claim filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et. seq., complaining that the employer discriminates against black applicants for employment on the basis of race where the discrimination against applicants artificially lowers the number of black persons in the workforce, and deprives the employee of a nondiscriminatory work environment.

4. Whether the Court of Appeals, violated the principles of Crown, Cork & Seal v. Parker, 462 U.S. 345 (1983), United Airlines v. McDonald, 432 U.S. 538 (1974) and Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), by its failure to hold that the commencement and certification of a class action tolled the filing requirements of Title VII for putative class members.

PARTIES

The parties to this proceeding are Peners L. Griffin, Henry Dejerinett, Alvin Smith, John Butler, Raymond W. Gearey, Louie L. Wainwright, Richard L. Duggger, the State of Florida, the Florida Department of Corrections, and a class composed of all past, present, and potential black employees of the State of Florida Department of Corrections.

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PENERS L. GRIFFIN, et al.,

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Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioners, Peners L. Griffin, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on August 7, 1987, rehearing denied October 30, 1987. The opinion of the court of appeals is reported at 823 F.2d 1476 (1987) and is set out in the separate

Appendix at pages 1a to 85a. The Order of the district court certifying the class, entered March 12, 1981, is set out in the Appendix at pages 86a to 94a. The Order of the district court allowing intervention and reaffirming class certification, entered July 30, 1982 is set out in the Appendix at pages 95a to 110a. The district court's Memorandum Opinion, of August 25, 1983 is unreported, and set out in the Appendix at pages 111a to 188a.

Jurisdiction

The judgment of the court of appeals was entered on August 7, 1987. A timely petition for rehearing was filed on September 28, 1987, and the order of the court of appeals denying the petition for rehearing and the suggestion for rehearing en banc was entered on October 30, 1987.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provision Involved

(See Appendix page 189a)

Statement of the Case

This is an action brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. Petitioner, Peners L. Griffin, the plaintiff below, was at all times relevant to these proceedings an employee of the Florida Department of Corrections (FDOC). This action was commenced in 1979, as a class action, charging the defendants with maintaining racially discriminatory policies with respect to recruitment, hiring, assignment, promotion and discipline; with maintaining a racially biased working environment; and with

utilizing an unlawful written entrance examination.

The parties submitted a stipulation which, together with the record, established the factual predicate for the court's March 12, 1981 order certifying a class of "all past, present and potential black employees of the State of Florida Department of Corrections". (Appendix 86a)

Following this Court's decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), plaintiffs and Alvin Smith filed a motion to intervene class member Smith, who had failed the Correctional Officer I (COI) examination after the class was certified. The district court permitted Smith to intervene and to represent class members who had failed the discriminatory examination.

In 1982, the district court held, on Motion for Summary Judgment, that the entry-level examination for correctional officers was unlawful because it had a racially disparate impact and, as admitted by the FDOC, was not validated. Following trial on the remaining issues, notice was given to class members affected by the test in order to begin stage two relief proceedings. More than 1400 persons filed claims as a result of the notice.

Pursuant to § 1292(b), FDOC took an interlocutory appeal of the district court's order certifying the class. In August 1987, a divided panel of the Eleventh Circuit vacated the class certification order, holding that none of the three named plaintiffs could properly represent a class of individuals who had failed the Correctional Officer I examination.

The Eleventh Circuit declared the class certification improper, holding that while the intervening applicant who failed the examination had standing to assert the claim, he should not have been allowed to intervene on the basis of the incumbent employee's EEOC charge.

Although the court acknowledged the general rule that an individual who did not file an EEOC charge may sue so long as a timely charge was filed encompassing the claims he seeks to litigate, it found that this "single-filing" rule did not justify allowing the intervening applicant to intervene.

As noted by Judge Hatchett in dissent,

> [T]he majority has grafted the constitutional standing requirement for parties litigating in federal district court onto the filing requirements for persons alleging Title VII claims before

> the EEOC. Such a requirement does not, and never has existed.

Griffin v. Dugger, 823 F.2d at 1494.

In so holding the panel effectively limits the scope of an individual's standing to file an EEOC charge so as to prevent a charging party from challenging discrimination that affects him or her as a result of an employer's maintenance of a discriminatory working environment.

A timely petition for rehearing and suggestion for rehearing en banc were filed.[1] The petition and suggestion were denied by order of the court on October 30, 1987.

Statement of the Facts

The Florida Department of Corrections (FDOC) operates the state correctional

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[1] The Equal Employment Opportunity Commission filed an amicus brief in support of the petition for rehearing and suggestion for rehearing en banc.

system, and at the time of trial employed approximately 8,600 persons. More than half of these employees are assigned to the protective service job category. The entry-level position in that career ladder is Correctional Officer I (COI).

In April 1971, Petitioner Peners L. Griffin became the first black Road Prison Officer at the Tallahassee Road Prison, operated by the Florida Department of Corrections. When Griffin's 1975 charge was filed, there were no blacks at all in the ranks of the 41 superintendents, assistant superintendents, and personnel managers, and only one of the 19 correctional chiefs was black. Pl.Ex.D-8. Of the 129 lieutenants (Correctional Officer III and Correctional Shift Supervisor), only seven were black. Pl.Ex.d-6a, Table 2. Given the subjective nature of the decision making used in

determining promotion and other employment related matters, the FDOC's artificial limiting of the number of black employees hired, directly influenced Griffin's ability to be promoted, his exposure to discipline, and the quality of his professional experience.

The district court's substantive determination, that the FDOC's use of the Correctional Officer I written examination violated Title VII, is not in issue. The district court analyzed the impact of the test using both the four/fifths rule of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §1607.4(D), and a calculation of the standard deviation with respect to black/white pass-fail rates, cited by this Court in Castenda v. Partida, 430 U.S. 482, 496 n.17 (1977). Under both these methods, the district court found that

plaintiffs had established the disparate impact of the correctional officer examination, and that the defendant had failed to provide a justification for its use.

In 1975, following two terminations which were overturned when administratively challenged, Mr. Griffin filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), in "which he alleged discrimination by the FDOC against blacks in discipline, hiring, promotions, and other employment practices."[2]

After requesting a right-to-sue letter, Mr. Griffin timely filed a complaint in this action on October 15, 1979. The complaint, filed on behalf of himself and others similarly situated,

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[2] Memorandum Opinion, August 25, 1983, Appendix 111a, 114a.

specifically challenged as discriminatory the defendants' policies and practices related to recruitment, hiring, assignment, promotion, and discipline; the maintenance of a racially biased working environment; and, the utilization of written entry level examinations which have a discriminatory impact on members of the class.

On June 17, 1980 Henry L. Dejerinett was added as a party-plaintiff. And on March 12, 1982 the district court certified the case as a class action with Messrs. Griffin and Dejerinett representing a class of "all past, present, and potential black employees of the State of Florida Department of Corrections".

Following the decision of this Court in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), plaintiffs

filed a motion to intervene Alvin Smith,[3] who failed the exam while he was a member of the certified class, as an additional named plaintiff to represent those in the class who had applied for the position of correctional officer, failed the written entry-level examination, and not been hired. The defendants filed a motion to vacate the class certification order.

On July 28, 1982, the district court denied the defendants' motion to decertify the class, and permitted Smith to intervene, noting that as an unsuccessful applicant Smith had an interest in the suit, which sought, inter alia, to challenge the defendants' hiring practices.

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[3] In July 1982, Intervenor Smith also filed a charge with the EEOC challenging the discriminatory impact of the correctional officer examination on black applicants for employment.

The district court rejected the defendants' contention that Smith could not be a class representative because he had not filed a timely charge with the EEOC. Rather, the district court held that the charges of discrimination filed by Griffin included the hiring claim, in addition to promotion, job classification, discipline, and termination claims. Relying on the Fifth Circuit's single-filing rule, as articulated in Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968), the district court held that Smith was not required to satisfy additional administrative prerequisites.[4]

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[4] The single-filing rule provides that where one plaintiff has filed a valid EEOC charge, individuals with claims arising out of similar discriminatory treatment in the same time frame may proceed in court without satisfying the filing requirement. "It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC". Oatis v. Crown Zellerbach

See also, Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975).

Applying reasoning similar to that used by this Court in Crown, Cork & Seal v. Parker, 462 U.S. 345 (1983), the district court upheld Smith's motion to intervene, finding that while Falcon was decided on June 14, 1982, plaintiffs' filed their motion to intervene on July 8, 1982.

> This court finds that defendants will not suffer prejudice if Smith is allowed to intervene. Defendants have been on notice since the institution of this action that they must defend against hiring claims. The parties have conducted discovery regarding the hiring issue, and have vigorously litigated this claim as evidenced by the motion for partial summary judgment.

Corp., 398 F.2d 496, 498 (5th Cir. 1968). The rule "presupposes, of course, that the subsequent claims are sufficiently similar to the original complaint and the employer received adequate notice and an opportunity for conciliation". Snell v. Suffolk County, 782 F.2d 1094, 1100 (2nd Cir. 1986).

Order, July 30, 1982, App. 108.

Reasons For Granting The Writ

INTRODUCTION

The court of appeals judgment is based principally on its application of Falcon, not to questions related to Rule 23, Federal Rules of Civil Procedure, but to the constitutional requirements for standing and the statutory requirements for filing an EEOC charge. In so doing, as noted by Judge Hatchett in dissent, the court failed to distinguish between the policy underlying the constitutional standing requirement, and the purpose and effect of an administrative agency's conciliation process.

On appeal, the defendants did not deny that they violated Title VII to the detriment of thousands of black applicants. Rather, they sought and

obtained from the court of appeals a procedural bar which deprives individual class members of their entitlement to relief.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ESTABLISHING STANDING TO FILE A CHARGE BEFORE THE EEOC, AND WITH THE STATUTORY PURPOSE OF TITLE VII

The central issue posed by this case is whether the single-filing rule permits applicant Smith to proceed pursuant to employee Griffin's 1975 charge complaining of hiring discrimination. In addressing that question, the Eleventh Circuit focused on whether Griffin was a proper party under Rule 23, Federal Rules of Civil Procedure, and Falcon, to represent a class of failed applicants in federal court, rather than whether Griffin could properly charge the FDOC with hiring

discrimination before the EEOC, pursuant to §706 of Title VII. Plainly, under clear prior precedent in the Fifth Circuit and elsewhere, Griffin could claim personal injury as a result of FDOC's hiring practices through the loss of benefits arising from association with black co-workers in a working environment unaffected by discrimination.[5]

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[5] As argued by petitioners below, that injury could fairly be traced to a correctional officer examination which eliminated potential black colleagues at a rate six times that of white applicants, and therefore was obviously detrimental to the work environment and tended to segregate it. Compare Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260-64 (1977) (Citing United States v. SCRAP, 412 U.S. 669, 688 (1973), where the Court held that the injury may be indirect, though the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.) In Arlington Heights, the Court found such an injury traceable between a municipality's discriminatory zoning decision and injury to a developer who had contracted to build a low-income housing project, and also to a prospective minority tenant who sought such housing in the village.

The Eleventh Circuit's decision in this case is in direct conflict with the decision of the Seventh Circuit in Steward V. Hannon, 675 F.2d 846 (1982). There, in an action challenging the use of an assistant principal examination given by the Chicago Public School System because it was racially discriminatory, the only plaintiff to have received an EEOC right-to-sue letter was a white teacher. The court of appeals concluded that Congress intended to define Title VII standing as broadly as the Constitution permitted. Since the white plaintiff alleged in her complaint that she was forced to work in an environment permeated with racial discrimination, she stated a cognizable claim under Title VII. Similarly, Griffin's complaint alleged that FDOC maintained a racially biased working environment.

In Waters v. Heublein, Inc. 547 F.2d 466, 469 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977),(white woman had standing to sue to enjoin employment discrimination directed at blacks and Hispanic-Americans), EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980), cert denied, 453 U.S. 912 (1981), (white employee allowed to charge her employer with discriminating against blacks on the basis of race in recruitment and hiring in violation of Title VII), cert. denied, 435 U.S. 915 (1978), and EEOC v. Bailey Co., 563 F.2d 439, 451-54 (6th Cir. 1977), (definition of a person claiming to be aggrieved under Title VII includes a white person, here a white employee, who may have suffered from the loss of benefits from the lack of association with racial minorities at work), the Ninth, Fifth and Sixth Circuits

relied on this Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) to hold that a white plaintiff had standing to challenge discrimination against nonwhite groups.

Section 706(b) of Title VII provides that a charge of discrimination may be "filed by or on behalf of a person claiming to be aggrieved. . ." 42 U.S.C. §2000e-5(b). In determining that Mr. Griffin could not file a charge either on behalf of other blacks suffering from hiring discrimination, or on behalf of himself challenging the discriminatory environment in which he was forced to work, the Eleventh Circuit gave an impermissible reading of the Article III standing requirements as applied to the filing of an administrative charge under Title VII.

The Equal Employment Opportunity Commission has consistently taken the position that all applicants and employees have a right under Title VII to a discrimination-free working environment, as a term or condition of their employment.

> The Commission interprets Section 706(a) of Title VII of the Civil Rights Act of 1964, to mean that any employee has standing to file a charge of employment discrimination alleging the commission of any unlawful employment practice by his employer, because it constitutes a term or condition of employment for all employees. Although the charging party is not a member of the class against which the allegedly unlawful employment practices are directly committed, we believe it clear that an employee's legitimate interest in the terms and conditions of his employment comprehends his right to work in an atmosphere free of unlawful employment practices and their consequences.

Dec. No. 70-09 (1969), 1973 EEOC DEC. [CCH] ¶ 6026 p. 4049. See also Dec. No.

72-0591 (1971), id. at ¶ 6314 p. 4562, 4564; Dec. No. 71-969 (1970), id. at ¶ 6193 p. 4328, 4329. Brief Of Amicus Curiae Equal Employment Opportunity Commission in Support of Petition For Panel Rehearing and Suggestion of In Banc Consideration at 9-10. See also, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

Consistent with this broad interpretation of the right of individuals to initiate Title VII administrative proceedings, Congress amended Title VII in 1972 to allow persons, agencies, and organizations that may have no relationship with the party charged, to file an EEOC charge on behalf of an aggrieved party.[6] Such a charge need not name the person on whose behalf it is

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[6] See, Cong. Rec. (H 1862), March 8, 1972.

made, and the aggrieved party may request that his or her identity remain confidential, although the party filing the charge must provide the EEOC with the name, address and telephone number of the aggrieved person.

As noted by this Court in EEOC v. Shell Oil Co. 466 U.S. 54, 68 (1984), "a charge of discrimination is not the equivalent of a complaint initiating a lawsuit". Rather, the purpose of the charge is to place the EEOC on notice that "someone . . . believes that an employer has violated the Title [VII]" id., and "to give prompt notice to the employer" Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982). Additionally, "Congress not only authorized but requires the Commission [EEOC] to investigate charges of discrimination", EEOC v. Children's Hospital, 719 F.2d 1426, 1428 (9th Cir.

1983), see also, 42 U.S.C. § 2000e-5(b), and conciliation, through the administrative process, is the favored route to resolution of Title VII claims. Foster v. Gueory, 655 F.2d 1319, 1321-23 (D.C. Cir. 1981); Snell v. Suffolk County, 782 F.2d 1094, 1100 (2d Cir. 1986).

Given the differences between the policy underlining the Article III cases or controversies standing requirements, and the conciliatory purposes of the policy underlining the statutory scheme of Title VII, there is little to suggest that the scope of a charge before an administrative body, such as the EEOC, must conform to the dictates of the most narrow reading of Article III standing.

> To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts.

FCC v. Nat. Broadcasting Co., 319 U.S. 239, 248 (1943) (Frankfurter, J., dissenting):

The decision below destroys the flexibility embodied in the administrative process, to the detriment of the more than 1,400 claimants who relied upon it. While acknowledging that Griffin had raised a testing claim before the EEOC, the court rejected Smith's assertion of that claim because of its view that Griffin lacked the Article III standing necessary to raise the initial claim before the EEOC.

> Griffin never had constitutional standing to raise a testing or a hiring claim, a fundamental requirement underlying the single-filing rule: . . . Smith cannot point to Griffin's EEOC charge, which arguably contained a testing claim brought on behalf of others, to excuse his failure to have filed his own testing charge with the EEOC when Griffin did not have standing to raise the testing issue. We cannot permit the

> single-filing rule to be used to circumvent the constitutional requirement of standing.

Griffin v. Dugger, 823 F.2d at 1493.

The Eleventh Circuit's decision explicitly conflicts with the reasoning of the Fifth Circuit in Harris v. Amoco Production Co., 768 F.2d 669, 679 (5th Cir. 1985), wherein the court held that the characterization by this Court and others, of the relevant statutory provisions as procedural rather than jurisdictional, "denotes an issue not of Article III power but of legislative and judicial method".

The Eleventh Circuit does not make clear how its new procedural burden enhances the purpose of Congress or aids the EEOC conciliation process. Contrary to the constitutional requirement that federal courts hear only lawsuits

involving "cases or controversy",[7] the EEOC conciliation process is not designed to be adversarial.[8] If the EEOC fails to bring about a settlement, the consequence may be a lawsuit, however the parties are not limited by the results of the EEOC's investigation, and the court is not bound by an EEOC finding of probable cause.

In Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968), the Fifth Circuit established the fundamental

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[7] U.S. Constitution Art. III, § 2

[8] As this Court has previously observed, the EEOC,

> is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 365 (1977).

principle that a charge of discrimination, filed by a single plaintiff, adequately exhausts administrative remedies for the entire class. See, Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8 (1975).

Where, as here, the charge indisputably satisfies the statutory purposes of both notice and opportunity to settle, there is little purpose in also requiring that the charging party have a level of standing sufficient to satisfy the requirements of Rule 23 and Falcon.

Moreover, several circuits have adopted the single-filing rule unencumbered by the narrow standing requirement imposed by the Eleventh Circuit. Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981) (Where the two claims are so similar that it can fairly be said that no conciliatory purpose would be served by filing separate EEOC charges, then it

would be "wasteful if not vain,"... to require separate EEOC filings); Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir 1983), cert. denied, 466 U.S. 951 (1984); Snell v. Suffolk County, 782 F.2d 1094, 1100-02 (2d Cir. 1986); Allen v. Amalgamated Transit Union, 554 F.2d 876, 882-83, n.9 (8th Cir. 1977), cert. denied, 434 U.S. 891 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

The Eleventh Circuit held that the first prong of the single-filing rule - that "at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective" Jackson v. Seaboard Coast Line Railroad Co., 678 F.2d 992, 1011-12 (11th Cir. 1982) - was met. However, the court erroneously held that the second prong of the rule - the similarity of the claims - was not

investigation of the correctional officer examination, and thus permitted the parties a first opportunity to settle the hiring grievance through the EEOC conciliation process.

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court held in its Order Certifying Class, March 12, 1981, App. 86a, 105a,

> [T]his suit has been litigated for years as a class which included applicants. See, e.g., Documents 54, 108, and 120. Extensive discovery has taken place on the hiring issue. See, e.g., Documents 37, 38, and 43. It would be greatly prejudicial, at this late date, to exclude potential employees from the class.

See also, Memorandum Opinion, August 25, 1983, App. 114a.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINION IN TRAFFICANTE V. METROPOLITAN LIFE INSURANCE CO., 409 U.S. 205 (1972), AND WITH THE DECISIONS OF OTHER COURTS OF APPEAL INTERPRETING THAT OPINION.

The issue presented by this case is not whether Griffin could properly represent, in federal court, class members who failed the Correctional Officer I examination. Plainly, under Falcon Griffin could not represent that sub-class. On the other hand, the law is equally clear that as an employee Griffin has a right to litigate, even before a federal court, his employer's maintenance of a discriminatory working environment, and to show the connection between the employer's hiring policies and the injury he suffers as a result of those policies.

The court of appeals' conclusion conflicts with this Court's decision in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972). In Trafficante, this Court held that the language of §810 of the Fair Housing Act, authorizing a "person aggrieved" to file suit under the Act, was intended by Congress to confer standing to the fullest extent permitted by Article III. The Court reasoned that since black and white tenants of an apartment complex, which allegedly discriminated against non-whites, alleged "injury in fact" in the form of the lost benefits of interracial association, they had standing to sue. See also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).

The reasoning applied by the Court in Trafficante has been consistently applied by the courts of appeal to allow broad

standing in Title VII cases. In EEOC v. Mississippi College, 626 F.2d 477, 481-84 (5th Cir. 1980), the Fifth Circuit held that a white woman had standing to charge her employer with race discrimination in hiring, noting that she was a "person claiming to be aggrieved," within the meaning of §706 of Title VII, 42 U.S.C. §2000e-5, because she "could claim that the discrimination deprived her of the benefits arising from association with racial minorities in a working environment unaffected by discrimination".

> [T]he strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in Section 706 of Title VII must be construed in the same manner that Trafficante construed the term 'aggrieved person' in Section 810 of the Fair Housing Act.

Id. at 482.

The Eleventh Circuit's opinion conflicts with the holdings of other courts of appeals which have applied Trafficante in an identical fashion. EEOC v. Bailey Co., 563 F.2d 439, 450-54 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978) and Waters v. Heublein, 547 F.2d 466, 469-70 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977). See also Hackett v. McGuire Brothers, 445 F.2d. 442 (3rd Cir. 1971)[10] (Language of 42 U.S.C. §2000e-5 "shows congressional intention to define standing as broadly as permitted by Article III of the Constitution"); Gray v. Greyhound Lines, 545 F.2d 169, 173-75 (D.C. 1976) (Citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972), for the proposition that "[I]njuries to intangible interests fulfill the constitutional

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[10] Cited with approval in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 209 (1972).

requirements as well as do injuries to economic interests."); and Berkman v. City of New York, 626 F.Supp. 591, 593-94 (E.D.N.Y. 1985) (Female firefighters had standing to challenge entry exam since the result of discrimination in future hiring would leave them an insular minority of women who slipped through the department's screening practices.). See also, Rogers v. EEOC, 454 F.2d 234, 237-39 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), cited with approval in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), (Hispanic complainant could raise a claim under Title VII by alleging that her employer created an offensive working environment for employees by giving discriminatory service to its Hispanic clientele.)

Trafficante and its progeny clearly stand for the proposition that in

interpreting §706 of Title VII, the broadest, not the most narrow, application of Article III standing applies. It follows that Griffin's assertion of injury as a result of the hiring policies of the defendant, and his complaint of his employer's maintenance of a discriminatory work environment, satisfies the standing requirements of Article III as set out by this Court and applied by the courts of appeal.

The impact of Falcon on this process is that in order to sustain a subsequent across-the-board class action in federal court, the original charging party must be joined at the litigation stage by an additional class representative who not only has broad Article III standing to litigate the general issue, but is specifically appropriate to represent absent class members who may have suffered

a more direct injury from the same policy.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINIONS IN CROWN, CORK & SEAL V. PARKER, 462 U.S. 345 (1983), ZIPES V. TRANS WORLD AIRLINES, INC. 455 U.S. 385 (1982) AND UNITED AIRLINES V. MCDONALD, 432 U.S. 385 (1977)

In failing to recognize intervenor Smith's status as an appropriate class representative, the Eleventh Circuit ignored a line of Supreme Court cases designed to protect the rights of putative and actual class members, as well as to protect the integrity and use of the class action device. American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), United Airlines v. McDonald, 432 U.S. 385 (1977), and Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983).

In United Airlines v. McDonald, supra, 432 U.S. at 391-392, n.11, this Court held that the tolling principle of American Pipe & Construction Co. v. Utah, supra, applied to both limitations periods established by Title VII: the initial 180 day charge filing period; and the ninety day limitation for filing suit following the receipt of a right-to-sue letter. The Court held that the "critical fact" was that the intervenor acted "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." 432 U.S. at 394.

In summarily asserting that Smith had not filed a timely charge with the EEOC,[11]

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[11] The court of appeals determination that Smith had not filed a timely charge was in effect De Novo fact finding, in that the district court did not reach the question of the application of the tolling principles explained in Crown Cork & Seal Co. v. Parker, 462 U.S.

the court of appeals failed even to address petitioners' arguments that Smith's charge was entitled to timely consideration on the basis of these holdings.

In Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983), this Court held:

> We conclude, as did the Court in American Pipe, that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. 414 U.S. at 554, 94 S.Ct. at 766. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits

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345 (1983), and other cases, relying instead on the single-filing rule. The court of appeals, after holding that the single-filing rule was inapplicable here, inexplicably failed to address the question of equitable tolling, or to remand for further fact-finding by the district court. See, Griffin v. Dugger, n.8 Appendix 11a.

> or to intervene as plaintiffs in the pending action.

Id. at 353.

In the case at bar, as soon as it became likely, by virtue of this Court's holding in Falcon, that Griffin and Dejerinett might no longer be able to represent his interest, Smith filed a separate charge of discrimination with the EEOC and sought to intervene in the existing action.

At the time that Smith failed the Correctional Officer I examination, he was a member of the class, represented by Griffin and Dejerinett. It follows that since a class action had already been filed and certified, the 180 day period for filing a charge with the EEOC was tolled by virtue of the filing of Griffin's lawsuit. Therefore, it was not until after Falcon and there was a challenge to the certification that it

became necessary for Smith to move to protect his independent right to proceed against FDOC.

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 397 (1982), this Court specifically held that the Title VII "provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." Rather, the Court held that this provision was more in the nature of a "statute of limitation" subject to recognized equitable doctrines and not a restriction of jurisdiction. Accord, Gooding v. Warner-Lambert Co., 744 F.2d 354, 358 (3rd Cir. 1984); Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091, 1093-95 (4th Cir. 1982); Sterns v. Consolidated Management, Inc., 747 F.2d 1105, 1110-11 (7th Cir. 1984); Vance v. Whirlpool Corp., 716 F.2d 1010, 1012 (4th Cir. 1983), cert.

denied 465 U.S. 1102 (1984); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981)(en banc)

The Fifth Circuit, considering this line of cases, held:

> The import of these cases is clear: characterizing a statutory provision to be procedural rather than jurisdictional denotes an issue not of article III power, but of legislative and judicial method . . . Where a provision proves to be merely a condition precedent to bringing suit instead of a source of judicial power, the courts can, given the appropriate circumstances, equitably modify their application of the statutory terms.

Harris v. Amoco Products Co., 768 F.2d 669, 679 (5th Cir. 1985).

The Eleventh Circuit's opinion is plainly a rejection of the holdings of these cases, and raises important questions concerning several settled principles. In resolving the issues presented, a divided panel failed to

address the application of Crown, Cork, & Seal Co. v. Parker, 462 U.S. 345 (1983), and similar cases, which established tolling of the statute of limitations for putative class members. Ignoring the policy underlying the EEOC filing requirement, as well as the statutory language itself, the court held that the most narrow reading of the constitutional standing requirement for parties litigating in federal court applied to persons alleging claims before the EEOC. And, having applied that narrow view of Article III standing, the court of appeals refused to allow intervention of a putative class member under the single-filing rule.

The panel's decision below severely jeopardizes the claims of over 1400 class members who have relied for more than a decade on the lower court's determination of the class status of these proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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No. 87-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

APPENDIX OF OPINIONS AND STATUTES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Northern District of Florida

No. 85-3831

Decided: August 7, 1987

PENERS L. GRIFFIN and HENRY L. DEJERINETT,

Plaintiffs-Appellees,

v.

RICHARD L. DUGGER, etc., et al.,

Defendants-Appellants.

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

TJOFLAT, Circuit Judge:

I.

In April 1971, Peners L. Griffin became the first black road Prison Officer at the Tallahassee Road Prison, operated by the Florida Department of Corrections (FDOC or Department). Be-

ginning in 1973, Griffin frequently sought promotion to higher-grade correctional officer positions, as well as various other positions. On each occasion, the FDOC turned him down.

In December 1974, Griffin's supervisor fired him for disciplinary reasons. The next day, the Regional Superintendent reinstated Griffin because the supervisor had not followed proper termination procedures. In early 1975, the FDOC again terminated Griffin's employment, without notice, for disciplinary reasons. He appealed the termination to the State of Florida Career Service Commission. The Commission found no just cause for Griffin's discharge and ordered the FDOC to reinstate him with back pay. The Florida District Court of Appeal affirmed the Commission's decision, and the FDOC reinstated Griffin to his position.

Soon after Griffin's reinstatement, he filed a complaint with the FDOC's Equal Employment Opportunity Program Office, charging that his two dismissals were racially discriminatory. An investigator in that office wrote Griffin a month later and informed him of his conclusion that racial discrimination had not been a factor in the dismissals. Within a day or two of having received that letter, Griffin filed a complaint with the Equal Employment Opportunity Commission (EEOC), detailing the events leading up to his allegedly discriminatory dis-charges. A notation at the beginning of Griffin's complaint, probably made by an EEOC counselor, describes Griffin's alle-gations of racial discrimination as also encompassing "[s]incerity of recruiting, hiring, and promoting of minority groups

within the Florida's Division of Adult Corrections. Specific attention within the Community Service Program."

Griffin asked the EEOC for a right-to-sue letter and received one in July 1979. On October 15, 1979, Griffin brought this action in the district court against Louis L. Wainwright, as Secretary of the FDOC, the FDOC, and the State of Florida. Griffin alleged that the FDOC had denied him several promotions because of his race. He also alleged that the FDOC impermissibly considered race in all of its promotion decisions, as well as in its hiring and job assignment decisions. In hiring correctional officers, according to Griffin, the Department used written entry-level examinations having a detrimental impact upon blacks.[1]

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[1] The district court found the following facts concerning the FDOC's written entry-level examination: "Every

Griffin sued "individually and on behalf of all others similarly situated," pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, seeking declaratory and injunctive relief and money damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976)(current version of 42 U.S.C. §§ 2000e to 2000e-17 (1982)), 42 U.S.C. § 1981 (1976),[2] and 42 U.S.C. §

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person seeking a position as a correctional officer is required to take a written examination. The Department of Administration developed the correctional Officer I entry level test which consists of seventy-five questions. An applicant must receive a score of at least thirty-eight for employment consideration."

[2] §1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and

1983 (1976).[3] The class identified in his complaint was composed "of all past, present and potential black American

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exactions for every kind, and to no other.

[3] § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Griffin's complaint stated that his action was brought "pursuant to 42 U.S.C. § 1983, to redress the deprivation of the Plaintiff GRIFFIN's property interests in his employment, without due process of law." We assume that Griffin's section 1983 claim also encompassed the theory that the FDOC's conduct amounted to invidious discrimination in the violation of the fourteenth amendment's equal protection clause.

citizens and residents who have been, are or may be employees of the Defendants or applicants for employment."[4]

On June 17, 1980, Griffin obtained leave of court to amend his complaint to add Henry L. Dejerinett as a party-plaintiff and class representative. Dejerinett, who is black, had applied for an FDOC clerical position but was not

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[4] The claims described in the text were presented in count I of Griffin's complaint, which contained two counts. Count II, which is not pertinent to this appeal, alleged that Griffin was denied due process and equal protection of the law when the FDOC terminated his employment in 1975; Griffin alleged that the FDOC(a) failed to give him notice of the reason for his discharge and an opportunity to be heard before terminating his employment and (b) discharged him because of his race. Count II further alleged that because Chapter 110 of the Florida Statutes, which governs state employment, did not require the Department to give him notice, a hearing, or back pay, Chapter 110 was unconstitutional.

hired.[5] On March 10, 1981, based on a stipulation between the parties[6] and without a hearing, the district court preliminarily certified the case as a class action with Griffin and Dejerinett

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[5] Dejerinett subsequently filed a timely charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980.

[6] The parties stipulated, among other things, that

> [t]he allegations of race discrimination in the ... Complaint involve questions of law and fact which, under current law in the United States Court of Appeals, Fifth Circuit, are common to the class, including statistical evidence, evidence concerning the employment system of the State of Florida Department of Corrections, and the common legal principles applied to claims of race discrimination. The parties maintain their right to brief these issues on appeal, if any.

The parties also "reserve[d] the right to move to decertify or limit the class, or to establish subclasses, at any time during the pendency of this litigation."

representing the class of "all past, present, and potential black employees of the State of Florida Department of Corrections."

On June 25, 1982, the defendants filed a Notice Regarding the Adequacy of the Preliminary Class Certified," which called to the court's attention a Supreme Court decision rendered eleven days previously. That decision, General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), announced the appropriate standards courts should apply when determining class action certifications in the context of a Title VII suit, reversing a former Fifth Circuit decision permitting "across-the-board" class actions that had been binding precedent in the new Eleventh Circuit.[7] On July 8,

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[7] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this court adopted as binding

1982, the defendants moved the court, in light of Falcon, to vacate its order certifying the class.

To avoid the risk that the district court might vacate its order certifying the class, Griffin and Dejerinett took steps to obtain an additional named plaintiff to represent those in the class who had applied for the position of correctional officer, failed the written entry-level examination, and not been hired. Accordingly, on July 8, 1982, Alvin Smith, joined by Griffin and Dejerinett, moved the court to intervene as an additional named plaintiff and class representative. In 1980 and 1981, Smith, who is black, applied for the same entry-level position that Griffin held. The FDOC did not hire Smith, because he

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precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

did not have a high school diploma or a general equivalency diploma (GED), a prerequisite for employment as a correctional officer. Smith later obtained a GED, but when he reapplied with the FDOC in July 1981, he failed the written entry-level correctional officer examination and was again denied the job.[8]

On July 28, 1982, the district court denied the defendants' motion to decertify the class and permitted Smith to intervene[9] because

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[8] Smith never filed a timely charge of racial discrimination with the EEOC.

[9] In its dispositive order, the district court did not address the intervenor's complaint, which was filed with Griffin, Dejerinett, and Smith's joint motion for leave to allow Smith to intervene. Apparently, the court treated the intervenor's complaint as an amendment to Griffin and Dejerinett's complaint because it ordered that the "action shall continue to be certified as a class with PENERS L. GRIFFIN, HENRY L.

> Smith, [as] an unsuccessful applicant, certainly has an interest in this suit which seeks to challenge defendants' employment practices, including hiring. Unless he is permitted to intervene, his interest may not be adequately represented by the named parties. Mr. Smith eases this court's concern that the class claim against the [FDOC]'s objective criteria was not fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees.

DEJERINETT, and ALVIN SMITH as named plaintiffs representing a class of all past, present, and potential black employees of the State of Florida Department of corrections."

As to the defendants' contention that Smith could not be a class representative because he had not timely filed an EEOC complaint, the district court found that the charges of discrimination Griffin had filed with the EEOC included "the hiring claim in addition to promotion, job classification, discipline, and termination claims." The court thus reasoned that the Fifth Circuit's single-filing rule excused Smith from having failed to exhaust his administrative remedies. See Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968))"[O]nce an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated....").

On July 30, 1982, the district court entered partial summary judgment

for the plaintiffs, including Griffin and Dejerinett, on the liability issue as to the written entry-level examination.[10] The court found that the FDOC examination "has a disparate impact upon class members which has not been justified by business necessity." The plaintiffs had sought summary judgment on two other issues -- the class hiring and promotion claims -- but the court denied summary judgment on those issues because they presented material issues of fact.

A trial was held over the five-week period beginning August 17 and ending September 17, 1982. The court entered judgment on August 25, 1983, disposing of the following issues in favor of the defendants: whether the FDOC's policies and practices discriminated against past,

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[10] The district court said it would consider the issue of relief at trial.

present, and potential black employees; whether the FDOC's hiring practices as to Henry L. Dejerinett were racially discriminatory. The court entered judgment for the plaintiffs on the liability issue concerning the correctional officer examination, on which it had previously granted summary judgment for the plaintiffs.[11] The issue of relief for the class of black persons who took and failed the correctional officer written examination is still pending. The parties agreed that notice should be given to the affected members of the class and to seek interlocutory appeal of the district court's decision permitting

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[11] The district court did not render judgment on Griffin's federal due process and equal protection claims or on his pendent state law claim for malicious prosecution (which was first raised in count III of Griffin's first amended complaint). Those claims are still pending in the district court.

Griffin, Dejerinett, and Smith to serve as named plaintffs for a class that included applicants with testing claims. We granted this appeal pursuant to 28 U.S.C. § 1292(b)(1982 & Supp. III 1985). Because we conclude that the district court's incorrectly applied the dictates of Falcon, we vacate the district court's order certifying the class.

II.

As with any private class action, the legitimacy of a private Title VII suit brought on behalf of a class depends upon the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional standing to raise the claim (or claims) and who has satisfied the procedural requirements of Title

VII.[12] Second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be fulfilled; in other words, the individual plaintiff must be qualified to represent the members of the class in accordance with the four prerequisites of Rule 23(a),[13] and the

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[12] This circuit has held that the conditions precedent to filing a Title VII suit are not jurisdictional, but rather are akin to a statute of limitations. A plaintiff's failure to satisfy the conditions precedent does not, standing alone, deprive federal district courts of subject matter jurisdiction. Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982). Nevertheless, "a plaintiff must generally allege in his complaint that 'all conditions precedent to the institution of the lawsuit have been fulfilled.'" Id. at 1010 (quoting Fed.R.Civ.P. 9(c)).

[13] Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the

action must be one of the three types Rule 23(b) identifies.[14] We emphasize

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claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[14] Rule 23(b) provides as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the

that any analysis of class certification must begin with the issue of standing and the procedural requirements of Title VII. Thus, the threshold question is whether the named plaintiffs have individual standing, in the constitutional sense, to raise certain issues. See Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A July 1981)("This constitutional threshold must be met before any consideration of the typicality of claims or common-

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members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

ality of issues required for procedural reasons by Fed.R.Civ.P. 23"). Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others. See generally 2A. Larson & L. Larson, Employment discrimination §§ 49.50-.51 (1986 & Supp. Nov. 1986).

A.

Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir. ("To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or

that the prospective relief will remove the harm.")(citation omitted), cert denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); Thurston v. Dekle, 531 F.2d 1264, 1269 (5th Cir. 1976)("The threshold case-or-controversy inquiry is whether there existed a named plaintiff with standing to raise the issue before the court."), vacated on other grounds, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978). If he cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear his grievance. This individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which [he] purport[s] to represent." Warth v. Seldin, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d

343 (1975); see also Minority Police Officers Assoc. v. City of South Bend, 721 F.2d 197, 202 (7th Cir. 1983)("Feelings of solidarity do not confer standing to sue."). Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, "even if the persons described in the class definition would have standing themselves to sue." Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); see also Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1200 (5th Cir.), cert denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984). A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone -- not for himself, and not

for any other member of the class. O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Moreover, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. This relationship between standing and the class action has been discussed in some detail by the Supreme Court:

> It is not enough that the conduct of which the plaintiff complains will injury someone. The complaining party must also show that he is within the

> class of persons who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Blum v. Yaretsky, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982)(citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 1968-69, 32 L.Ed.2d 627 (1972)).

In the case before us, the named plaintiff who initiated the action, Peners L. Griffin,[15] could, and did, allege injury as a result of the FDOC's

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[15] Our analysis of the standing and Rule 23 issues presented by this case focuses first on Peners L. Griffin as a sole named plaintiff. We then examine whether the addition of Henry L. Dejerinett and Alvin Smith as named plaintiffs affected the class certification.

discipline and promotion practices: he claimed that on specific occasions the FDOC illegally disciplined him and did not promote him, because of his race.[16] Griffin had standing to assert discipline and promotion claims. Because he had already met the educational and testing requirements of a road prison correctional officer and had been hired for that position, however, he suffered no injury as a result of the FDOC's use of the written entry-level examination. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir.)"[Named p]laintiffs ... possessed tenth grade educa-

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[16] Griffin satisfied the procedural requirements of Title VII, such as filing an EEOC complaint against his employer within 180 days of the alleged discrimination, see 42 U.S.C. § 2000e-5(c)(1976), and receiving statutory notice of the right to sue his employer, see 42 U.S.C. § 2000c-5(f)(1). See generally 42 U.S.C. § 2000e-5(detailing conditions precedent to a Title VII action).

tions and therefore lacked [constitutional] standing" to challenge tenth grade educational requirement), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Griffin thus lacked constitutional standing to assert a testing claim.[17]

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[17] Griffin's complaint alleged that the FDOC had implemented policies and practices of discrimination, including "maintaining a racially biased working environment" and "failing or refusing to recruit, hire,and assign blacks on the same basis as whites." Nothing in the complaint, in the district court's certification orders, or in the record on appeal alleged or established a causal link between the FDOC's allegedly discriminatory testing policy and its allegedly discriminatory work environment or its allegedly discriminatory promotion and discipline practices. Nor is there an allegation or showing in the record that Griffin (or Dejerinett, who was a clerk employed by the FDOC) suffered any specific harm resulting from the allegedly discriminatory work environment. Thus Griffin (and Dejerinett) did not establish standing to challenge the FDOC's testing practices. Cf. Gray v. Greyhound Lines, 545 F.2d 169, 173-75 (D.C. Cir. 1976), cited with approval in Meritor Savings Bank v. Vinson, ____ U.S. ____, ____, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49

Accordingly, we hold that the district court erred when it permitted Griffin to raise the testing claim on

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(1986).

Assuming, for the sake of argument, that Griffin (or Dejerinett) had established standing to assert a testing claim, we nevertheless believe that under General Tel. Co. v. Falcon, 457 U.S. 147 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the court should not have presumptively held that Griffin satisfied the requirements of Rule 23(a) so as to allow him to represent a class of applicants with testing claims. Griffin's complaint provided "an insufficient basis for concluding that the adjudication of his claim of [a racially discriminatory environment] would require the decision of any common question concerning the failure of [the FDOC] to hire more [black correctional officers]." See Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. The record does not identify any questions of law or fact that were common to Griffin's claim of a racially biased working environment and the claims of those who failed the written entry-level correctional officer examination and were not hired. Thus, even if Griffin had standing to litigate his right to a work environment untainted by racial discrimination, he could not, on that basis, represent those with testing claims, because he did not satisfy the requirements of Rule 23(a).

behalf of himself and on behalf of others. We hold in the alternative that even if Griffin somehow had constitutional standing to assert the testing claim, he did not, in light of General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired.[18] In other words, Griffin did not meet the prerequisites of Rule 23(a). We now turn to a discussion of Rule 23(a) and the Supreme Court's interpretation of it in Falcon.

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[18] In Falcon, the Supreme Court granted certiorari for the express purpose of discussing the contours of Rule 23(a). Falcon, 457 U.S. at 155, 102 S.Ct. at 2369. The Court did not question, in its opinion, whether the named plaintiff had constitutional standing.

policies and practices. See e.g., Gibson v. Local 40 Int'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259 (9th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), cert. denied, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973).[19]

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[19] Although widely accepted, the across-the-board theory was not universally endorsed. See, e.g., Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975); Kinsey v. Legg, Mason & Co., 60 F.R.D. 91 (D.D.C. 1973), rev'd sub nom on other grounds, 557 F.2d 830 (D.C. Cir. 1977); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971); Gresham v. Ford Motor Co., 53 F.R.D. 105 (N.D. Ga. 1970); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970). Moreover, one of the members of the Fifth Circuit panel that first announced the across-the-board

The Supreme Court repudiated that liberal reading of the class action, and the reasoning underlying it, in General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).[20] In

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approach, Judge Godbold, cautioned in a specially concurring opinion that the approach announced in the majority's opinion was not a replacement for precise pleadings that allow district courts to determine whether the requirements of Rule 23(a) have been satisfied. See Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., specially concurring). Judge Godbold also observed that "an over-broad framing of the class" may be unfair and harmful to the absent class members: "what of the catastrophic consequences if the plaintiff loses and carries the [over-broad] class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?" Id. at 1126. Thirteen years later, the Supreme Court favorably discussed Judge Godbold's opinion when it rejected the across-the board approach. See General Tel. Co. v. Falcon, 457 U.S. 147, 160-61, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982).

[20] Even before Falcon, the across-the-board approach was placed in doubt by the Supreme Court. In East Texas Motor Freight Sys. Inc. v. Rodriquez, 431 U.S.

allegations quite similar to those made in Griffin's initial complaint, the named plaintiff in Falcon claimed that his employer had denied him promotions because he was a Mexican-American. He also alleged class claims on behalf of all Mexican-American employees of the company who had not been promoted, and all Mexican-American applicants who had not

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395, 405-06, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453 (1977), the Court reversed a broad class certification:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

been hired. Without holding an evidentiary hearing, the district court certified a class consisting of those employees and applicants at one of the company's facilities. After a trial, the district court found that the employer had not discriminated against the named plaintiff in hiring, but did discriminate against him in its promotion practices. As to the class claims, the court reached the converse conclusion, finding no discrimination in promotion practices, but finding the hiring practices unlawfully discriminatory. On appeal, the Fifth Circuit, using the across-the-board approach, upheld the class certification:

> [The across-the-board rule] permits an employee complaining of one employment practice to represent another complaining of another practice, if the

> plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin.

Falcon v. General Tel. Co., 626 F.2d 369, 375 (5th Cir. 1980).

The Supreme Court, on certiorari, began its analysis of the case by reiterating that Title VII does not relieve a private party plaintiff seeking to represent others from meeting the requirements of the class action rule:[21] "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numer-

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[21] In contrast, under Title VII, the EEOC may seek relief for groups of employees or applicants without having to comply with the requirements of Rule 23. General Tel. Co. v. EEOC, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980).

osity, commonality, typicality, and adequacy of representation' specified in Rule 23(a). These requirements effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.'" General Tel. Co.. v. Falcon, 457 U.S. 147, 156, 102 S.Ct. 2364, 2369-70, 72 L.Ed.2d 740 (1982)(citations omitted). Although the Court recognized "that racial discrimination is by definition class discrimination," it said that the mere allegation of racial discrimination cannot answer the questions posed by Rule 23(a) or define the class that may be certified:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation tnat the

> company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Falcon, 457 U.S. at 157, 102 S.Ct. at 2370 (footnote omitted). Thus, evidence that an employee was denied a promotion because of illegal considerations of race will not necessarily justify the additional inference, for example, that the employer has adopted a general policy of racial discrimination that is reflected in the employer's other employment practices, such as hiring and testing. See

Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. The presumption that general class claims are fairly encompassed within the personal claims of a named plaintiff can, at best, be characterized as tenuous. Id. The Falcon Court held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." Falcon, 457 U.S. at 160, 102 S.Ct. at 2372. This means that a private Title VII class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Falcon, 457 U.S. at 161, 102 S.Ct. at 2372.

The district court's error in Falcon can be traced to the named plaintiff's complaint, which "provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the

decision of a common question concerning the failure of petitioner to hire more Mexican-Americans." Id. at 158, 102 S.Ct. at 2371. Without the benefit of sufficiently specific pleadings or of a hearing that probed beyond the pleadings to answer the required certification questions, see id. at 160, 102 S.Ct. at 2372, the district court could do nothing but presume that the named plaintiff's individual promotion claim was typical of other claims that Mexican-American employees and applicants might raise. Id. at 158-59, 102 S.Ct. at 2371. In short, a district court must have some way of identifying the questions of law or fact that are common to claims of the named plaintiff and of the class members he seeks to represent. Id.

The Supreme Court has thus repudiated the across-the board theory of

Title VII class actions.[22] No longer will one allegation of specific discriminatory treatment be sufficient to sustain a company-wide class action.[23] No longer will an employee complaining of racial discrimination, for example, in one employment practice necessarily be permitted to represent other employees complaining of racial discrimination in

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22 "Although Falcon does not eliminate broad-based class actions per se, it will be a rare situation indeed that will permit the combining of hiring, promotion, and discharge claims in the same class." 2 A. Larson & L. Larson, Employment Discrimination § 49.52(c)(2) (1986).

23 In Falcon, 457 U.S. at 159, 102 S.Ct. 2371 (footnote omitted), the Court stated as follows:

> "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.

other practices. District courts must not presume that a named plaintiff has satisfied the typicality and commonality requirements of Rule 23(a). In practical terms, this means that, as a general rule, incumbent employees cannot represent a class that includes applicants and that even a general policy of discrimination will not justify a class of both applicants and employees. See Falcon, 457 U.S. at 158-59 & n.15, 102 S.Ct. at 2371 & n.15.

In footnote fifteen of Falcon, the Supreme Court identified exceptions to that general rule. For example, an employee who alleges that he was a victim of a specific discriminatory employment practice may properly represent applicants when the employer used a biased testing procedure to evaluate both applicants and incumbent employees: "a

class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Falcon, 457 U.S. at 159, n.15, 102 S.Ct. at 2371 n.15. In addition, a general policy of discrimination could justify a class of both applicants and employees "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." Id.

The situations the Supreme Court identified in footnote fifteen can be thought of as exceptions to the general rule that applicants and incumbent employees cannot share the same class. We emphasize, however, that those situations are exceptions not because

racial discrimination is by definition class discrimination, a necessarily valid proposition underlying the across-the-board rule, Falcon, 457 U.S. at 157, 102 S.Ct. at 2370, but because the commonality and typicality requirements of Rule 23(a) can be satisfied.[24] If, after a rigorous analysis, a district court is satisfied that in a case similar to those situations described in footnote fifteen the Rule 23(a) requirements have been met, then it should not hesitate to

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[24] See I H. Newberg, Newberg On Class Actions § 3.17 (2d ed. 1985):

> In the final analysis, through its rulings and examples, Falcon instructs that the Rule 23(a) typicality requirement can be satisfied only by a showing of a sufficient interrelationship between the claims of the representative and those of the class, so that an adjudication of the individual claims will necessarily involve the decision of common questions affecting the class.

certify the class. We caution, however, that although district courts should give real meaning to Falcon's footnote fifteen, that footnote should not be used to defeat the general dictates of Falcon. The footnote was not meant to sanction broad class actions that otherwise do not conform to Rule 23(a).

c.

We begin our analysis of whether the requirements of Rule 23(a) have been fulfilled in the case before us by examining Griffin's complaint.[25] The complaint, which was filed in October 1979, almost three years before Falcon was decided, included allegations that the defendants discriminated on the basis

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[25] Our analysis takes into account that the district court had considerable discretion in deciding to certify the class. See e.g., Walker v. Jim Dandy Co., 747 F.2d 1360, 1363 (11th Cir. 1984); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1347 (11th Cir. 1983).

of race with their written entry-level examinations and in their hiring, assignment, discipline, and promotion decisions. Griffin's action was brought "on behalf of all past, present and potential black American citizens and residents who have been, are or may be employees of the Defendants or applicants for employment." As to Rule 23(a)'s numerosity requirement the complaint contains the allegation that the persons in the class "are too numerous to join in this action."[26] The only reference to

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[26] In his second amended complaint, Griffin made the following numerosity allegation:

> The precise total number of persons in the class is unknown to the Plaintiffs. Plaintiffs allege, on information and belief, that there are more than 1,000 persons in this class. There are many other unknown class members. They are too numerous to join a named Plaintiffs and such joinder is impractical.

Griffin's ability to represent that class was this statement: "The Plaintiff can fairly and adequately represent the class." The complaint's only reference to Rule 23(a)'s commonality requirement was this statement: "The conclusory questions of whether there is a general pattern and practice of discrimination by Defendants and the question of whether certain practices constitute illegal job discrimination are common mixed questions of fact and law to the class as a whole." The complaint made no allegation whatsoever that Griffin could meet Rule 23(a)'s additional requirement of typicality.[27]

Without an evidentiary hearing, the district court preliminarily certified

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[27] The first reference to Rule 23(a)'s typicality requirement was in Griffin's second amended complaint, in which he alleged that "the claim of the Plaintiffs are typical of the claims of another class members."

the "class of all past, present, and potential black employees" of the FDOC, finding that the requirements of Rule 23(a) had been met. The court's certification ruling was based solely on a stipulation of the parties that under the law of the Fifth Circuit, the named plaintiffs met the commonality requirement of Rule 23(a).[28] The parties further stipulated that "[t]he claims of the named plaintiffs are, under current law in the United States of Appeals, Fifth Circuit, similar to those of other members of the proposed class."[29] The parties made no relevant factual stipulations.

Soon after the Supreme Court decided Falcon, the defendants moved the district

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[28] See supra note 6.

[29] The defendants reserved the right to move the district court to decertify the class. See supra note 6.

court to vacate the order certifying the class. The parties filed memorandum of law, arguing the applicability of Falcon. On the basis of the memoranda, and with no hearing, the district court issued an order denying the defendants' motion. The court's analysis began with the recognition that "[t]he Falcon decision mandates that this court carefully examine the requirements of Rule 23(a)."[30] As to the commonality requirement, the district court found the following:

> Plaintiffs have alleged a common practice and pattern of

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[30] As to the first requirement of Rule 23(a) -- "the class is so numerous that joinder of all members is impracticable" -- the district court found that "[t]he number of black persons employed by the [FDOC] in February 1981 was 1,346.... This number alone, without inquiry as to the number of past and potential black employees, clearly indicates that the class members are too numerous to join."

racial discrimination which affects defendants' hiring, promotion, job classification, disciplinary, and termination decisions. This general discriminatory policy commonly injures all members of the class of past, present, and potential black employees of the Department. Plaintiffs maintain that they will utilize similar statistical data, similar historical background, and the same or similar witnesses to support their allegations of class-wide discrimination. This court is satisfied that the commonality requirement of Rule 23 is met.

The district court found the typicality prerequisite satisfied, but

only because Henry L. Dejerinett, a black male who was not hired for a clerical position, had been added as a party-plaintiff and as a class representative. Even so, the court was concerned that Griffin and Dejerinett could not adequately represent those with objective testing claims:

> Plaintiff Griffin certainly can adequately protect the interests of black employees who have claims of discrimination in promotions, job classification, discipline, and terminations. Plaintiff Dejerinett's claim is somewhat interrelated with the class claims of a discriminatory hiring police. Plaintiffs allege that blacks are not hired in sufficient number because of facially

neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants. The class claim against discriminatory subjective hiring decisions is fairly encompassed in Dejerinett's claim. This court, however, is concerned that the class claim against the Department's objective screening criteria which have a disparate impact upon class members, especially the [FDOC] test, is not fairly and adequately protected by any

of the named plaintiffs.

In that same order, the district court permitted Alvin Smith to intervene as a party plaintiff. Smith was an unsuccessful black applicant for a correctional officer position who had failed the written entry-level correctional officer examination. The court wrote the following in its order: "Mr. Smith eases this court's concern that the class claim against the Department's objective criteria was not fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees."

As to Griffin's capacity to represent the "class of all past, present, and potential black employees" of the FDOC, we hold that, in light of Falcon, Griffin's complaint provided an insufficient basis by which the district court

could have concluded that Griffin's "claim[s] of discrimination in promotion [and discipline] would require the decision of any common question concerning the failure of [the defendants] to hire more [blacks]." Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. In our view, Griffin satisfied neither the commonality nor the typicality requirements of Rule 23(a).[31]

The district court found the commonality requirement satisfied because

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[31] As the Supreme Court noted in Falcon, 457 U.S. at 157 n.13, 102 S.Ct. at 2370 n.13,

> [t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

the "general discriminatory policy" Griffin alleged "commonly injures all members of the class" and that in order "to support their allegations of class-wide discrimination," Griffin would utilize "similar statistical data, similar historical background, and the same or similar witnesses." As to the typicality requirement, the district court found it satisfied because "[p]laintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants."

To us, the district court failed to appreciate the significance of Falcon. The district court did not engage in the kind of "rigorous analysis" that we believe the Falcon court contemplated. See Falcon, 457 U.S. at 161, 102 S.Ct. at 2372.

Griffin's initial complaint, relying on the then-valid across-the-board rule, made no factual showing to satisfy the Rule 23(a) requirements. Additionally, the two amended complaints, which included Dejerinett and Smith as named plaintiffs, offered no facts to satisfy the Rule 23(a) requirements. Moreover, the named plaintiffs' "Memorandum in Opposition to Motion to Vacate Order Certifying Class" offered little more than conclusory statements that the named plaintiffs satisfied the Rule 23(a) criteria. See Nelson v. United States

Steel Corp., 709 F.2d 675, 680 (11th Cir. 1983)("[Named plaintiff] was ... obligated to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class.") (citations omitted). Although the plaintiffs asserted that "[w]hether a person impacted by one employment practice may represent other persons impacted 'in the same manner' by another practice need not be reached in this case," they nonetheless tried to take refuge in Falcon's footnote fifteen, which states that a class of both applicants and employees could be justified "if the discrimination manifested itself in hiring and promotion practices in the same general fashion." Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15. This is the closest the named plaintiffs came to helping the district court con-

duct a rigorous Rule 23 inquiry. In fact, the plaintiffs, although aware of Falcon, continued to rely on the defunct across-the-board rule by citing a former Fifth Circuit case[32] that, in light of

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[32] In support of its typicality argument, the plaintiffs' memorandum of law cited Herbert v. Monsanto Co., 576 F.2d 77, 88 (5th Cir.), vacated and dismissed for want of jurisdiction, 580 F.2d 178 (5th Cir. 1978)(per curiam):

> Appellee contends that because appellant's claim concerns only the trucking activities of the company and other claimants are from different departments, appellant's claim is neither factually nor legally typical. We recognize, however, that the typicality requirement is not so rigid as to comprehend only similar fact situations. If class actions were limited to factual typicality, class actions under Title VII would be impossible because, except in rare cases, the facts would not be identical. It would be a better test for typicality to consider whether the types of facts or evidence were typical of the class. For example, if all claims, although of different job classifications, depended upon statistical

Falcon, was no longer good law.

The district court's commonality analysis amounts to nothing more than a presumption that racial discrimination as manifested in various employment practices raises a common question of law or fact. See Wheeler v. City of Columbus, 703 F.2d 853, 855 (5th Cir. 1983)(per curiam)("Discrimination in its broadest sense is the only question alleged that is common to [the named plaintiff] and the class she sought to create and represent. Under Falcon this is not

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> evidence, and the statistics evidenced a policy of discrimination, typicality would be satisfied.

In light of Falcon, "general statistical evidence of underrepresentation in the workforce will undoubtedly not suffice to justify a single class covering different types of discrimination such as in hiring promotion, and discharge." 2 A. Larson & L. Larson, Employment Discrimination § 49.52(c)(2) (1986)(interpreting footnote 15 of Falcon, 457 U.s. at 159, 102 S.Ct. at 2371.

enough."). The district court's typicality analysis, which presumably is based on Falcon's footnote fifteen, is flawed. As we have already discussed, in that footnote the Falcon Court identified exceptions to the general rule that employees cannot represent a class that includes applicants, even though the employer's discrimination is manifested in various employment practices. One situation that may justify a class of both applicants and employees is when the discrimination that is manifested in various practices is effected "in the same general fashion, such as through entirely subjective decisionmaking processes." Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15. The named plaintiffs' assertions notwithstanding, the pleadings demonstrated that any general policy of discrimination that the

FDOC may have had did not manifest itself in the same general fashion.

When the Supreme Court used the term "same general fashion," it gave an example: "entirely subjective decision-making processes." Significant proof that an employer makes both discriminatory hiring and promotion decisions using an entirely subjective decisionmaking process for each employment practice is a manifestation of a general policy of discrimination operating in "the same general fashion." By qualifying "subjective decisionmaking processes" with "entirely," the Court implied that an employer's general policy of discrimination manifested, for example, by an objective hiring practice and by a subjective promotion practice would not be discrimination operating in "the same general fashion" sufficient to justify a

class of both applicants and employees.

The FDOC's decisionmaking process for hiring correctional officers is objective: applicants must hold a high school diploma or a general equivalency diploma and must pass the written correctional officer examination. In contrast, the FDOC's decisionmaking process for promoting correctional officers, and other employees, is subjective: applicants for promotion need not hold advanced degrees or pass any additional examinations; correctional officers are promoted on the basis of their performance as viewed by their superiors. The case before us is not one that implicates Falcon's footnote fifteen.

We therefore hold that Griffin, an incumbent correctional officer complaining of a subjective decisionmaking pro-

cess, could not represent a class that included those who may have been victims of a discriminatory objective decision-making process, such as applicants for the position of correctional officer who took the written entry-level examination and failed it. See e.g., Walker v. Jim Dandy Co., 747 F.2d 136, 1365 (11th Cir. 1984)("Following Falcon ... we hold that [plaintiffs'] complaint provided an insufficient basis for concluding that the adjudication of [their] claim of discrimination in hiring supervisory employees would require the resolution of common questions of law and fact concerning [the employer's] discriminatory practices in recruitment, job assignment, transfer, and promotion."); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1387 (5th Cir. 1983) ("Under Falcon, plaintiff cannot serve as

class representative with respect to hiring, promotion, or any other employment practices excepting discriminatory discharge because she does not possess the same interest and did not suffer the same injury as the other members of the class."); Taylor v. Block, 35 Fed.R. Serv.2d (Callagham) 546 (D.D.C. Oct. 15, 1982)(plaintiffs who alleged they suffered only promotion discrimination could not represent across-the-board class claiming hiring, assignment, and training discrimination). In other words, Griffin, who could assert discipline and promotion claims under Title VII, did not have representative capacity, within the meaning of Rule 23(a), to assert testing claims on behalf of others.[33] We now

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[33] Because Griffin satisfied neither the commonalty nor the typicality requirements of Rule 23(a), we need not address whether he could have been an adequate representative of the class.

examine whether the addition of Henry L. Dejerinett and Alvin Smith as named plaintiffs affected the class certification question.

III.

Eight months after filing his complaint in district court, Griffin sought leave to amend his complaint to add Henry L. Dejerinett as a party-plaintiff and as a class representative. In November 1978, Dejerinett applied for an FDOC clerical position, entitled "Property Manager III." Dejerinett was not required, as part of the application process, to produce an educational degree or to take the written entry-level examination required of correctional officer applicants. He was required, however, to have an interview. Dejerinett was not hired; instead, the FDOC hired a white

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See Fed.R.Civ. P. 23(a)(4).

male. A month later, Dejerinett filed a charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980. The district court, with no written analysis of standing or Rule 23, granted Griffin leave to amend his complaint and add Dejerinett as a named plaintiff.

Dejerinett had standing to assert a subjective hiring claim.[34] He applied

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[34] There is some indication in the record that the Florida Department of Administration, on the basis of testing, training, and experience, rated Dejerinett as well-qualified for the clerk position. We cannot tell from the record whether any testing done by the Department of Administration measured health, physical ability, or intelligence. In any event, because the rating took experience and training into account, there was a substantial subjective component to the rating. We also note that because Dejerinett received a well-qualified rating (which presumably was a

for a clerical position, requiring no correctional officer examination or educational degrees, and was not hired. Because Dejerinett never took the correctional officer examination, and never applied for that position, he suffered no injury as a result of that test. He thus lacked constitutional standing to assert a testing or a hiring claim arising out of the FDOC's correctional officer application process.

Accordingly, we hold that the district court erred when it permitted Dejerinett to raise the testing claim on behalf of himself and on behalf of others. We hold in the alternative that even if Dejerinett somehow had constitutional standing to assert the testing

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reason he was granted an interview), he did not allege that the Department of Administration's rating process illegally discriminated against black applicants.

claim, he did not, in light of General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired.[35] In other words, Dejerinett did not meet the prerequisites of Rule 23(a).

The district court, in effect, presumed the similarity of hiring claims of those denied clerical positions to hiring claims of those denied correctional officer positions. In our view, applicants who were subjectively denied clerical positions cannot sufficiently identify with other applicants who failed an objective written examination and, on that basis, were not hired for the higher-ranking position of correctional

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35 See supra note 18.

officer. See Walker v. Jim Dandy Co., 747 F.2d 1360, 1364 (11th Cir. 1984)("The [district] court [correctly] reasoned that because [the plaintiffs] were applicants for supervisory positions, they did not sufficiently identify with other applicants for lower level labor jobs or employees complaining of disparate job assignments or pay.") The district court abused its discretion when, in light of Falcon, it continued to permit Dejerinett to represent those members of the class who took and failed the written entry-level correctional officer examination.

B.

Intervenor Alvin Smith twice applied for the entry-level correctional officer position held by Griffin. Smith was first denied the job because he did not have a high school diploma or a general equivalency diploma (GED), both require-

ments for the job. Later he obtained a GED, but he then failed the written correctional officer examination. Consequently, he was denied the position a second time.

Smith had constitutional standing to assert a testing claim under Title VII. He could, and did, allege injury as a result of the FDOC's testing requirement: he took and failed the written examination required of entry-level correctional officers. Although Smith may very well have had representative capacity, under Rule 23(a), to assert testing claims on behalf of other black applicants who failed the same test and were consequently not hired, we need not address that point. Smith did not file a timely charge of racial discrimination with the EEOC, a precondition to a Title VII suit. See 42 U.S.C. § 2000e-5(e)(1982); Jackson

v. Seaboard Coast Line R.R., 678 F.2d 992, 1010-11 (11th Cir. 1982); See also supra note 12. Furthermore, as we discuss below, Smith could not avail himself of the single-filing rule. For these reasons, we hold that the district court erred when it allowed Smith to intervene as a class representative.

In Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498-99 (5th Cir. 1968), our predecessor circuit held that it is not necessary for each person with the same grievance to file an EEOC charge as a prerequisite to class membership. Nor is it necessary that an intervenor bring a charge with the EEOC as a prerequisite to serving as a class representative. Id. As long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and

class members. Id.[36]

This rule, which has become known as the "single-filing rule," contains two essential requirements: "First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective.... Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." Jackson, 678 F.2d at 1011-12. In the case before us, the

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[36] The Oatis reasoning was extended to intervention in non-class suits in Wheeler v. American Home Prods. Corp., 582 F.2d 891, 897-98 (5th Cir. 1977)(similarly situated intervenors who had not filed EEOC charges nevertheless could assert back pay claims if one or more of original plaintiffs had filed timely charges).

The Oatis rationale was further extended in Crawford v. United States Steel Corp., 660 F.2d 663, 665-66 (5th Cir. Unit B Nov. 1981), which held that every original plaintiff in a multi-plaintiff, non-class action suit need not file charges with the EEOC.

first requirement was met: Griffin, one of the named plaintiffs, timely filed an adequate EEOC complaint, as far as it detailed his promotion and discipline claims. The second requirement, however, was not satisfied. Smith, a non-filing plaintiff, had an objective testing claim while Griffin, on the other hand, had subjective promotion and discipline claims.

We hold that Griffin and Smith were not sufficiently similarly situated. That is, employee Griffin's claims and applicant Smith's claims did not arise out of similar discriminatory treatment. Griffin alleged that the FDOC's subjective promotion and discipline practices were illegally discriminatory. Smith alleged that the FDOC's objective correctional officer examination illegally discriminated against black applicants.

The FDOC's promotion and discipline practices were not manifested in similar fashion to its hiring and testing practices. See Ezell v. Mobile Housing Bd., 709 F.2d 1376, 1381 (11th Cir. 1983)(non-filing incumbent plaintiff's discriminatory examination claim was not sufficiently similar to filing plaintffs' discriminatory discharge and broad-based, on-going campaign of discrimination claims to invoke single-filing rule to excuse filing requirement); Dalton v. Employment Sec. Comm'n, 671 F.2d 835, 838 (4th Cir.), cert. denied, 459 U.S. 862, 103 S.Ct. 138, 74 L.Ed.2d 117 (1982)(because non-charging plaintiff's hiring claim was not "substantially identical" to incumbent employee's claims of discriminatory treatment, single-filing rule did not apply). Although both employment practices could have been

racially discriminatory, that alone is not enough to implicate the second requirement of the single-filing rule. Otherwise, "intervention [could] bootstrap the court's jurisdiction to encompass claims regarding practices broader that the ... claims properly assertable by the named plaintffs." Vuyanish v. Republic Nat'l Bank, 723 F.2d 1195, 1201 (5th Cir.)(former employees who sought to intervene in class action but who did not file timely charges with EEOC could only proceed within periphery of issues that named plaintffs could assert), cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 91984); see also Wakeen v. Hoffman House, Inc., 724 F.2d 1238, 1246 (7th Cir. 1983)("[A] class member who does not meet the procedural prerequisites for waging a Title VII suit may not

use the guise of a motion to intervene to take over as the sole class representative for someone who initiates but is not legitimately able to continue a class action.").

We also note that merely because a notation at the beginning of Griffin's EEOC complaint stated that Griffin's charge also encompassed "[s]incerity of recruiting, hiring, and promoting of minority groups within the Florida's Division of Adult Corrections," Smith's status as a class representative was not saved. As the pleadings make clear, Griffin never had constitutional standing to raise a testing or a hiring claim, a fundamental requirement underlying the single-filing rule: "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the

class of persons similarly situated." Oatis, 398 F.2d at 498.[37] Smith cannot point to Griffin's EEOC charge, which arguably contained a testing claim brought on behalf of others, to excuse his failure to have filed his own testing charge with the EEOC when Griffin did not have standing to raise the testing issue. We cannot permit the single-filing rule to be used to circumvent the constitutional requirement of standing.

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[37] By "standing," the Oatis court meant "the issues as to which [the employee] is aggrieved," Oatis, 398 F.2d at 499, citing Title VII's enforcement provision that requires the EEOC to investigate the charges of a person claiming to be aggrieved, 42 U.S.C. § 2000e-5(a). By "standing," the Oatis court also meant, even if implicitly, personal injury, that is, constitutional standing. See id., at 498-99; see also, Vuyanish v. Nat'l Bank, 723 F.2d 1195, 1200-01 (5th Cir.)(interpreting Oatis' single-filing rule as implicating constitutional standing cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984).

IV.

In sum, based on standing principles and on the dictates of Falcon, we hold that the district court erred when it certified the class with the named plaintiffs as representatives. None of the named plaintiffs -- Griffin, Dejerinett, or Smith -- should have been allowed to represent the class of black correctional officer applicants with testing claims. The district court's order certifying the class is therefore

VACATED.

HATCHETT, Circuit Judge, dissenting:

I dissent. The majority holds that Smith did not meet the second element of the single-filing rule. That rule states, "the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame."

Jackson, 678 F.2d at 1011-12 (emphasis added). One of Griffin's claims in his EEOC complaint was that the FDOC discriminated against black job applicants. Non-filing intervenor Smith's claim arose "out of similar discriminatory treatment," because he alleges that the FDOC discriminated against him and other applicants through administration of a test with a discriminatory impact on blacks. The majority ignores the fact that Griffin raised the claim of discrimination against black applicants in his EEOC complaint.

The majority erroneously assumes that if Griffin lacks standing to raise the hiring claim in federal court, then his raising of that claim before the EEOC is somehow ineffective for purposes of the single-filing rule. The majority's reasoning is based upon its failure to

differentiate between the policy underlying the standing requirement in federal court and the policy underlying the single filing rule in an EEOC action. The policy underlying the standing requirement is to ensure that a party litigating an issue has a concrete stake in the outcome of the case, and is therefore motivated to vigorously litigate the issues. The policy underlying the EEOC filing requirement is to ensure "that the settlement of grievances be first attempted through the office of the EEOC...." Ezell v. Mobile Housing Board, 709 F.2d 1376, 1381 (11th Cir. 1983); Otis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). The purpose underlying the EEOC filing requirement is therefore to promote the resolution of Title VII claims out of court. The EEOC proceeding is not

designed as a way-station on the road to the federal courthouse.

By asserting a hiring grievance in his EEOC complaint, Griffin ensured "that the settlement of [hiring] grievances [would] be first attempted through the office of the EEOC." Ezell, 709 F.2d at 1381. The fact that Griffin may not have had standing in federal district court to raise the hiring issue is irrelevant to the fact that his EEOC complaint gave the EEOC an opportunity to settle the hiring grievance before that grievance was sued upon in federal district court. Since Smith's claim in federal district court of discriminatory hiring practices is identical to the claim of discriminatory hiring practices asserted in Griffin's complaint before the EEOC, involving the single filing rule will not frustrate the purpose of the EEOC filing requirement:

to give the EEOC a chance to resolve Title VII claims before they go to court. The fact that Griffin may not have had standing to raise the hiring claim in court is irrelevant to the issue of whether the EEOC has had a chance to resolve that claim before it is taken to court, whether by Griffin, Smith, or anyone else.

In short, the majority has grafted the constitutional standing requirement for parties litigating in federal district court onto the filing requirements for persons alleging Title VII claims before the EEOC. Such a requirement does not, and never has, existed. The majority, however, misinterprets Fifth Circuit dicta to reach just that conclusion. That dicta says, "Once an aggrieved person raises a particular issue with the EEOC which he has standing

to raise, he may bring an action for himself and the class of persons similarly situated." Oatis, 398 F.2d at 498. The majority fails to mention that the sole issue in the Oatis case was whether a Title VII class action could include in the class persons who had not previously filed charges with the EEOC. The court held that the class could include such persons. The Oatis court gave its reasoning for this holding in the sentence immediately preceding the language relied upon by the majority in this case. That sentence states, "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." Oatis, 398 F.2d at 498. In short, the court in Oatis was not faced with the question of whether an EEOC complainant could effectively file claims with the

EEOC even though the complainant would not have standing to assert the claim in federal district court. The majority's application of constitutional standing requirements to the EEOC complainant puts the EEOC in the nonsensical position of having to anticipate how the federal district court will rule on the complainant's standing to litigate various claims if the EEOC does not resolve them. Such a rule will result in the EEOC narrowing its resolution of claims to those which it anticipates the complainant will have standing to sue upon in federal district court, regardless of the apparent existence of the alleged discrimination with respect to other employees or job applicants. Such a situation would hardly further the purpose of the EEOC filing requirement: to resolve Title VII claims out of court.

> Title 42 U.S.C. § 2000e-5(b) says: Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge ... and shall make an investigation thereof.

This provision requires the Commission to investigate all charges which a person "claims" to be aggrieved of. In no way does the provision suggest that the Commission is limited to the investigation of claims which the complainant will have standing to bring in a federal court. Any suggestion in Oatis of such a requirement is dicta that is in conflict with the intent of the statute that the

EEOC resolve "claimed" discrimination out of court. Smith should therefore be allowed to proceed in federal district court as a class representative for the class of applicants who failed the objective test.

UNITED STATES COURT OF APPEALS
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: March 12, 1981

PENERS L. GRIFFIN and HENRY L. DEJERINETT, both individually and on behalf of others similarly situated,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, et al.,

Defendants.

ORDER CERTIFYING CLASS

On the basis of the record in this case and the attached stipulation of the parties, which is hereby incorporated in this order as the findings of this court, the court finds that this action should be certified as a class action with the above-named plaintiffs representing a class of all past, present, and potential

black employees of the State of Florida Department of Corrections.

The court finds that the requirements of Federal Rule of Civil Procedure 23(b)(2) have been satisfied and that plaintiffs have met the requirements of Federal Rule of Civil Procedure 23(a). A decision on class certification is conditional and subject to modification at any time prior to a decision on the merits. See Fed.R.Civ.P. 23(c)(1); Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975).

Accordingly, it is ORDERED AND ADJUDGED

1. Plaintiffs' motion to certify the class (Document 16) is GRANTED and the court hereby certifies this case as an action on behalf of the following class: all past, present, and potential black employees of the State of Florida

Department of Corrections.

2. The class certification hearing schedule,d to take place on April 2, 1981 is hereby cancelled.

DONE AND ORDERED this 10th day of March, 1981.

s/s William Stafford
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided:

PENERS L. GRIFFIN and HENRY L. DEJERINETT, etc.,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, etc., et al.,

Defendants.

STIPULATION

The Plaintiffs and Defendants, by and through their undersigned counsel, for the purpose of permitting the Court to determine preliminarily whether this action shall be maintained as a class action and for no other purpose, stipulate and agree as follows:

1. The number of persons in the proposed class of all past, Present and potential black employees of the State of Florida Department of Corrections is greater than 1,000.

2. The allegations of race discrimination in the Second Amended Complaint involve questions of law and fact which, under current law in the United Stares Court of Appeals, Fifth Circuit, are common to the class, including statistical evidence, evidence concerning the employment system of the State of Florida Department of Corrections, and the common legal principles applied to claims of race discrimination. The parties maintain their right to brief these issues on appeal, if any.

3. Plaintiffs' counsel are competent to prosecute this action as a class action. The named plaintiffs are

willing and able to prosecute this action on behalf of the class. The parties reserve the right to present evidence and argument, at trial or at the hearing of any motion filed pursuant to paragraph "7" of this Stipulation, concerning the allegation that the Plaintiff Griffin withdrew his first charge of discrimination.

4. The claims of the named plaintiffs are, under current law in the United States Court of Appeals, Fifth Circuit, similar to those of other members of the proposed class. The parties maintain their right to brief these issues on appeal, if any. The Defendants believe that the employment record of the Plaintiff Griffin is not typical, but recognize that this issue relates to the merits of the claim rather than to the existence of the claim. The

Defendants further believe that the claims of the Plaintiff Dejerinett are typical only of claims concerning employment at the Central Office of the Department of Corrections.

5. The Defendants reserve all defenses alleged in their amended answer to the second amended complaint, except their response, stated in their Eleventh Defense, to paragraphs numbered "8", "9", "10", and "11" of the second amended complaint. A response to those paragraphs may be reasserted if the Defendants move pursuant to paragraph "7" of this Stipulation.

6. The parties do not agree as to the appropriate dates which begin the periods of potential liability in this action and reserve the right to present evidence and argument on this issue.

7. In the event that this action is preliminarily certified by the court as a class action, the parties reserve the right to move to decertify or limit the class, or to establish sub-classes, at any time during the pendency of this litigation.

8. The parties recognize that this Stipulation may be used by the court as a basis upon which to enter an order preliminarily certifying this action as a class action. The parties reserve the right to present evidence and argument concerning the appropriateness, vel non, and scope of the class at trial.

9. This Stipulation and the proposed class pertain only to the claims of employment discrimination and not to the other claims alleged in the second amended complaint.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: July 30, 1982

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, et al., etc.,

Defendants.

ORDER

The above-styled cause is a civil rights suit brought pursuant to 42 U.S.C. §§ 1981 and 2000e alleging discriminatory employment practices based on race. This court, by order dated March 10, 1981 (Document 84) and on the basis of a stipulation filed by the parties, certified this action as a class action with Peners L. Griffin and Henry L.

Dejerinett representing a class of all past, present, and potential black employees of the State of Florida Department of Corrections. The parties have litigated this action as an across--the-board discrimination claim with discovery covering the realm of employment practices including hiring, promotions, job classification, discipline, and terminations. On June 14, 1982, the United States Supreme Court rendered a decision faulting the Fifth Circuit's quasi-automatic across-the-board rule stressing the fact that all the requirements of Rule 23(a), Federal Rules of Civil Procedure must be satisfied for the maintenance of a class action. General Telephone Company of the Southwest v. Falcon, slip op. No. 81-574 (U.S. June 14, 1982). Relying on Falcon, defendants filed a motion to vacate the order

certifying class (Document 143) to which plaintffs responded in Document 146. Plaintiffs have filed a motion to intervene (Document 141) requesting this court to enter an order permitting Alvin Smith to intervene as a named plaintiff to represent the class of applicants who defendants have denied employment on the basis of a facially objective selection procedure which allegedly has a disparate impact upon black applicants. Defendants responded to this motion in Document 145.

Peners L. Griffin is a black employee of the Florida Department of Corrections. Plaintiff Griffin unsuccessfully applied for several promotions within the Department. Document 58, Defendants' Admissions 21-25, 30-32. He also alleges that he had been terminated twice for discriminatory reasons but

eventually was reinstated. Document 54, Second Amended Complaint ¶ 14. Griffin filed a charge of discrimination with the Equal Employment Opportunity Commission on February 22, 1975, and received a Notice of Right-to-Sue letter. Document 58, Defendants' Admission 20.

Henry L. Dejerinett, a black, unsuccessfully applied for the position of Property Manager III within the Department. Document 58, Defendants' Admissions 33 & 34. Defendant Dejerinett alleges that he was not hired because of defendants' impermissible racial considerations. Document 54, Second Amended Complaint ¶15. He filed a charge of discrimination with the Equal Employment Opportunity Commission. Document 57, Attachment.

Defendants assert that plaintiffs Griffin and Dejerinett cannot adequately

represent the class as preliminarily certified. Defendants posture that, at best, Griffin can adequately represent employees seeking promotion within the correctional officer lines within any region he applied for promotion and Dejerinett can adequately represent applicants seeking employment for clerical/office positions within region I. Defendants further claim that neither Griffin nor Dejerinett can represent a sub-class of applicants rejected for employment because they failed to receive a passing score on the FDOA exam given to all applicants for correctional officer jobs. Finally, defendants urge this court to inquire into plaintiffs' ability to bear the costs of this suit.

The Falcon decision mandates that this court carefully examine the requirements of Rule 23(a), Federal Rules of

Civil Procedure. No. 81-574, slip op. at 9. The first requirement is that "the class is no numerous that joinder of all members is impracticable." Federal R.Civ.P. 23(a)(1). The number of black persons employed by the Department in February 1981 was 1,346. Document 82, Defendants' Admission 62. This number alone, without inquiry as to the number of past and potential black employees, clearly indicates that the class members are too numerous to join.

The second requirement is that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). Plaintiffs have alleged a common practice and pattern of racial discrimination which affects defendants' hiring promotion, job classification, disciplinary, and termination decisions. This general discriminatory policy

commonly injures all members of the class of past, present, and potential black employees of the Department. Plaintiffs maintain that they will utilize similar statistical data, similar historical background and the same or similar witnesses to support their allegations of class-wide discrimination. This court is satisfied that the commonality requirement of Rule 23 is met.

The third prerequisite for maintaining a class action is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). This court must inquire "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Falcon, slip op. at 10 n.3. Plaintiff

Griffin certainly can adequately protect the interests of black employees who have claims of discrimination in promotions, job classifications, discipline, and terminations. Plaintiff Dejerinett's claim is somewhat interrelated with the class claims of a discriminatory hiring policy. Plaintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the FDOA test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decision-makers to discriminate against black applicants. The class claim against discriminatory subjective hiring decisions is fairly encompassed in Dejerinett's claim. This court, however, is concerned that the class claim against

the Department's objective screening criteria which have a disparate impact upon class members, especially the FDOA test, is not fairly and adequately protected by any of the named plaintiffs.

The fourth requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This court notes that plaintiffs and plaintiffs' counsel have efficiently litigated this complex action for three years, and trial will commence in three weeks. This demonstrates that plaintiffs are adequate representatives of the class. The court, however must also inquire whether there is a conflict of interest between the named plaintiffs and the class they seek to represent. See Falcon, slip op. at 10 n. 13. This court is mindful of the possible conflict of interest for

Plaintiff Griffin to represent applicants who were denied employment and who, if granted relief, might compete with him for promotions. The United States Supreme Court held that "[u]nder Rule 23, the same plaintiff could not represent these classes [of applicants]." General Telephone Company of the Northwest v. Equal Employment Opportunity Commission, 446 U.S. 318, 331 (1980). This court is of the view that if an unsuccessful applicants for a correctional officer position becomes a class representative, that applicant can adequately represent potential black employees. The prejudice which may result from the conflict between Griffin and the class of potential employees is far outweighed by the prejudice which would result if applicants could not be members of the class certified in this action. As is

discussed more fully below, this suit has been litigated for years as a class which included applicants. See, e.g., Documents 54, 108, and 120. Extensive discovery has taken place on the hiring issue. See, e.g., Documents 37, 38, and 43. It would be greatly prejudicial, at this late date, to exclude potential employees from the class.

This suit is a class action for injunctive or declaratory relief under Rule 23(b)(2;, Federal Rules of Civil Procedure. Defendants' contention that the class cannot encompass all the regions in the state because employment decisions are made independently at each regional level is not well-taken. Plaintiff Griffin has applied for promotion in four out of the five regions in the state. The propriety of defendants' behavior will be determined in a

single action, and if plaintiffs prevail, this court can fashion an adequate remedy.

Plaintiffs strenuously maintain the position that Griffin can adequately represent the class; however, in the alternative, plaintiffs have filed a motion to intervene on behalf of Alvin Smith. Mr. Smith applied for employment as a Correctional Officer I. Initially, Mr. Smith was denied employment because he had not completed high school. After obtaining his GED, he was again denied employment because he failed the written examination required of Correctional Officer I applicants.

Plaintiffs did not specify in their motion whether this was intervention of right, Fed.R.Civ.P. 24(a), or permissive intervention, Fed.R.Civ.P. 23(b). The foregoing discussion clearly demonstrates

that plaintiff may intervene as a matter of right.

Alvin Smith, an unsuccessful applicant, certainly has an interest in this suit which seeks to challenge defendants' employment practices, including hiring. Unless he is permitted to intervene, his interest may not be adequately represented by the named parties. Mr. Smith eases this court's concern that the class claim against the Department's objective criteria was fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees.

This court is of the view that this motion was timely filed. Falcon, which altered this circuit's position on across-the-board discrimination claims, was decided on June 14, 1982. Plaintiffs

filed their motion to intervene on July 8, 1982, as a result of Falcon. This court finds that defendants will not suffer prejudice if Smith is allowed to intervene. Defendants have been on notice since the institution of this action that they must defend against hiring claims. The parties have conducted discovery regarding the hiring issue, and have vigorously litigated this claim as evidenced by the motion for partial summary judgment (Document 108).

Defendants further contend that Smith cannot be a class representative because he did not timely file an EEOC complaint. This circuit adopted the single filing rule whereby "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similar-

ly situated...." Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 19680. An examination of Griffin's charges of discrimination (Document 148 Exhibits A & C) reveals that Griffin raised the hiring claim in addition to promotion, job classification, discipline, and termination claims. Griffin's charge, therefore, exhausted administrative remedies for the whole class and for all the claims.

ACCORDINGLY, it is ORDERED:

1. Defendants' motion to vacate order certifying class is DENIED.

2. Plaintiffs' motion to intervene is GRANTED.

3. This action shall continue to be certified as a class with PENERS L. GRIFFIN, HENRY L. DEJERINETT, and ALVIN SMITH as named plaintiffs representing a class of all past, present, and potential

black employees of the State of Florida Department of Corrections.

DONE AND ORDERED this 28th day of July, 1982.

s/s William Stafford
WILLIAM STAFFORD
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: August 25, 1983

PENERS L. GRIFFIN and HENRY L. DEJERINETT,

Plaintiffs,

and

ALVIN SMITH,

Intervenor,

all individually and on behalf of all others similarly situated,

v.

LOUIE L. WAINWRIGHT, individually and in his official capacity as Secretary of the Department of Corrections of Florida; THE STATE OF FLORIDA; THE DEPARTMENT OF CORRECTIONS, and any predecessor or successor agency; and RAYMOND W. GEARY, individually and in his official capacity as attorney for the Department of Corrections of Florida,

Defendants.

MEMORANDUM OPINION

This is a civil rights class action brought pursuant to 42 U.S.C. §§ 1981, 1983 and 2000e alleging discriminatory employment practices based on race. Federal jurisdiction is found in 28 U.S.C. § 1343. This action also involves individual claims of the named plaintiff Peners L. Griffin which are stated in Counts II and III of the second amended complaint. The issue of liability for the class claims was tried before the court without a jury from August 17, 1982, to September 17, 1982, following which the parties submitted extensive post-trial memoranda. From the pre-trial stipulation, the exhibits, admissions of the parties, and all testimony, and after considering the legal arguments made before, during, and after trial, the court now makes its findings of fact and

conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

I. HISTORY OF THE CASE

Plaintiff Peners L. Griffin, a black male, became employed with defendant Florida Department of Corrections (FDOC) or its predecessor agency in April 1971. Plaintiff Griffin was the first black person hired as a Road Prison Officer at the Tallahassee Road Prison operated by defendant FDOC. Since January 1973, plaintiff Griffin has applied for several promotions, but has never been selected Griffin received at least satisfactory employee evaluations from his date of hiring until sometime in 1974 when Wayne Scott, a white male, became Chief Correctional Counselor in Tallahassee. Scott fired Griffin in 1974; however, Regional Superintendent Hicks, a white

male, reinstated Griffin because FDOC failed to follow proper termination procedures. In early 1975 Griffin again was terminated, and he filed a Career Service appeal. The Career Service Commission found no "good cause" for Griffin's dismissal and ordered his reinstatement with back pay. On or about February 22, 1975, Griffin also filed a charge of discrimination with the Equal Employment Opportunity Commission (the EEOC) in which he alleged discrimination by the FDOC against blacks in discipline, hiring, promotions, and other employment practices. Defendants contend and plaintiffs deny that Griffin withdrew his 1975 charge; however, this issue was never raised at trial. Griffin requested a right-to-sue letter and received it on about July 23, 1979. Griffin filed this suit as a class action on October 15,

1979.

Griffin has been disciplined several times, and he has filed at least one other charge of discrimination with the EEOC against the FDOC. He requested and received a right-to-sue letter on this later charge on or about April 10, 1980.

Henry L. Dejerinett, a black male, applied for the FDOC position of Property Manager III in November 1978 Plaintiff Dejerinett was not hired; Kenneth Hayes, a white male, was selected. Dejerinett filed a charge of discrimination against the FDOC and received a right-to-sue letter on or about April 2, 1980.

On June 17, 1980, plaintiff Griffin sought leave of court to amend his complaint to add Henry L. Dejerinett as a named plaintiff. This court granted the motion by order dated November 25, 1980 (Document 53). Plaintiffs filed a second

amended complaint (Document 54) on December 15, 1980.

Based on the parties' stipulation, this court, by order dated March 10, 1981 (Document 84), certified the action as a class action with Peners L. Griffin and Henry L. Dejerinett representing a class of all past, present, and potential black employees of the FDOC. On July 8, 1982, defendants filed a motion to vacate the order certifying the class and plaintiffs moved for an order permitting Alvin Smith to intervene.

Alvin Smith, a black male, was denied employment as a Correctional Officer I because he had not earned a high school diploma or a general education degree (GED). Smith obtained a GED but failed the written correctional officer examination in July 1981. He, therefore, was denied employment.

This court allowed Smith to intervene to represent potential black employees. The court also reviewed the class certification in light of the recent case of General Telephone Company of the Southwest v. Falcon, 72 L.Ed.2d 740 (1982). By order dated July 28, 1982 (Document 150), the court continued to certify this action as a class action with Peners L. Griffin, Henry L. Dejerinett, and Alvin Smith as named plaintiffs and intervenor representing a class of all past, present, and potential black employees of the FDOC.

On July 30, 1982, this court entered an order (Document 157) granting partial summary judgment for plaintiffs and finding that the correctional officer written examination utilized by defendants in screening applicants for correctional officer positions had a

disparate impact upon class members which had not been justified by business necessity. This court denied summary judgment on the hiring and promotion claims because the court found plaintiffs' statistics used to support their claims were flawed.

Phase I, the liability for class claims, commenced on September 17, 1982. Phase I, part 1, consisted mostly of witnesses who were experts in the fields of economics and statistics. Phase I, part 2, was anecdotal evidence.

II. CLASS REEVALUATION

The court has a continuing duty to reevaluate class status throughout the litigation. Vuyanich v. Republic National Bank of Dallas, 505 F.Supp. 224, 233 (N.D. Tex. 1980); see also Cooper v. University of Texas at Dallas, 482 F. Supp. 187, 190 (N.D. Tex. 1979), aff'd,

648 F.2d 1039 (5th Cir. 1981). Although defendants have not filed a post-trial motion to decertify the class, they argue that plaintiff Griffin voluntarily withdrew his 1975 charge of discrimination and that there is no proof that the charge was an "across-the-board" claim. Defendants first raised the issue of whether Griffin withdrew the 1975 charge in a motion to dismiss the first amended complaint (Document 17). This court held that "the factual dispute regarding plaintiff's waiver of rights conferred by Title VII is an issue for trial " Document 53.

This issue was next mentioned in the pre-trial stipulation under the heading "Admitted Facts Requiring No Proof." It states:

> The Plaintiff, Peners L. Griffin, filed a charge of Discrimination, pursuant to Title VII, on or about February

> 22, 1975. A true copy of that charge has been filed in this action as Exhibit "A" To a Stipulation (Document 148) and is properly in evidence A Notice of Right-to-Sue was duly issued by the Department of Justice regarding that charge, and this action was timely filed under Title VII. Defendants assert and Plaintiffs deny that Griffin withdrew the charge

Document 166, p.11.

This issue was not litigated at trial and, in fact, was not raised until defendants' response and objections to plaintiffs' proposed findings and conclusions (Document 215).

This court is of the view that plaintiffs have both pleaded and proved that Griffin filed a charge of discrimination on or about February 22, 1975, and that he received a right-to-sue letter. As the pre-trial stipulation notes, the charge and letter are properly in evidence. Defendants have failed to

prove the defense that Griffin voluntarily withdrew the 1975 charge. The class, therefore, may rely on Griffin's 1975 charge, because the Fifth Circuit adopted the single filing rule whereby "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. . . ." Oatis v. Crown Zellerback Corp., 398 F.2d 496, 498 (5th Cir. 1968).

Defendants have also argued that there is only "the naked assertions of Griffin and his attorneys ... that the destroyed charge was an 'across-the--board' claim." Document 215, p.2. This statement is inaccurate. The 1975 charge is in evidence (Document 148, Exhibit A). A review of that charge clearly indicates that Griffin set forth

an across-the-board claim challenging the FDOC's practices in hiring, discipline, and promotions of blacks.

Griffin has alleged that these discriminatory practices are the result of a subjective decision-making process which has its roots in pre-Act procedures and continues until the present. Because plaintiffs attempted to prove that this discrimination pervades a pattern of events and is not isolated incidents, the charge could have been filed at any time. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472-73 (D.C. Cir. 1976); Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 246 (3rd Cir. 1975); Cooper v. University of Texas at Dallas, 482 F. Supp. 187, 190 (N.D. Tex. 1979). Defendants' liability commences March 24, 1972, the date which Title VII became applicable to the FDOC. The only

employees barred from the class are those who left the employ of the FDOC more than 300 days before the filing of Griffin's 1975 charge. See Laffey, 567 F.2d at 472-74; Wetzel, 508 F.2d at 246; Cooper, 482 F. Supp. at 190.

Defendants failed to present any evidence at trial which altered this court's findings that plaintiffs met the requirements for class certification set forth in Rule 23, Federal Rules of Civil Procedure (Document 150). This court now reaffirms its decision that this action shall be certified as a class action with Peners L. Griffin, Henry L. Dejerinett, and Alvin Smith as named plaintiffs and intervenor representing a class of all past, present, and potential black employees of the FDOC.

III. THE DEFENDANTS

Plaintiffs have sued Louie L. Wainwright, individually and in his official capacity as Secretary of the Department of Corrections of Florida. Defendant Wainwright is the chief executive officer of the FDOC.

Plaintiffs have also sued the State of Florida and the Department of Corrections. This court orally ruled that when referring to the State of Florida in this case, it shall mean the Florida Department of Corrections. Defendant FDOC is an executive department of the State of Florida and is an employee within the meaning of Title VII. 42 U.S.C. § 2000e(b).

Plaintiffs sued Raymond W. Geary, individually and in his official capacity as attorney for the FDOC. Defendant Geary was employed as general counsel for

the FDOC during pertinent times encompassed in this litigation.

IV. THE FLORIDA DEPARTMENT OF CORRECTIONS

The Department of Corrections has "supervisory and protective care, custody, and control of the inmates, buildings, grounds, property, and all other matters" pertaining to the state correctional system. Fla. Stat. § 945.025 (1981). In 1981, over half of the FDOC work force, 4451 out of 8594 jobs, was in EEO Category No. 4, Protective Services. The following positions with the FDOC are protective service jobs:

Correctional Counselor Chief I
Correctional Counselor Chief II
Correctional Officer Chief I
Correctional Officer Chief II
Correctional Officer Chief III
Correctional Officer I
Correctional Officer II
Correctional Officer III
Correctional Security Coordinator
Correctional Security Shift

Supervisor I
Correctional Security Shift
Supervisor II
Fire Chief
Firefighter II
Prison Inspector and Investigation Supervisor
Prison Inspector and Investigator

There are statutory qualifications for the correctional Officer position. The Florida Statutes required:

> After July 1, 1974, any person employed as a correctional officer shall:
> (1) Have reached the age of majority.
> (2) Be a citizen of the United States.
> (3) Be a high school graduate or its equivalent" as the term may be determined by the council.
> (4) Have his fingerprints on file with the council or agency designated by the council.
> (5) Have passed an examination by a licensed physician based on specifications established by the council.
> (6) Have a good moral character as determined by investigation under procedures established by the council.

Fla. Stat. $ 944.584 (1975). These requirements have changed slightly. Since July 1, 1980, one must be age nineteen and after July 1, 1981, meet the additional requirement of not having been convicted of a felony or misdemeanor involving moral turpitude. Fla. Stat. § 943.13 (1981).

An applicant seeking a position as a correctional officer was required to pass a written examination consisting of seventy-five questions to be considered for employment. Any applicant who failed to score at least thirty-eight on the test was automatically excluded from consideration. The FDOC ceased using a written examination in August, 1982, immediately after this court found that it had a disparate impact.

V. THE DECISION-MAKING PROCESS

A. Hiring

When there is a vacancy for a correctional officer, the FDOC issues a vacancy announcement. Applicants file applications which are reviewed by the personnel officer at the institution where there is a vacancy. The applications are screened for the minimal requirements such as age and education. Then the applications are reviewed by a committee which usually consists of a chief correctional officer, a lieutenant, and sometimes a personnel manager at the location. The committee interviews applicants who are deemed to be qualified and prior to August, 1982, those who had passed the written examination. The interview normally consists of questions about an applicant's prior work history, interest in the field, and

questions designed to determine an applicant's potential effectiveness as a correctional officer. The committee makes a recommendation to the institution's superintendent who has the hiring authority.

The hiring process for clerical employees is similar to the procedure used for correctional officers. Usually a clerical vacancy is advertised locally and the personnel office screens the applications. The supervisor or department head further screens the applications and after interviewing the applicants, makes a recommendation through the personnel manager to the superintendent who is the hiring authority.

B. Promotions

When there is a vacancy for a position above a Correctional Officer I position, a vacancy announcement is

published. The applications are reviewed by the personnel office, which forwards applications of those who meet the training and experience requirements set forth in the class specifications to the chief correctional officer. A committee interviews the qualified applicants and makes a recommendation through the personnel officer to the superintendent Generally the criteria considered in promotional decisions are:

(1) seniority;
(2) training;
(3) education;
(4) time on the job (actual experience gained in the position sought, such as in an "acting" capacity);
(5) job stability;
(6) professional development;
(7) performance evaluation;
(8) recommendations from peers and superiors;
(9) demonstrated leadership; and
(10) administrative experience.

C. Performance Evaluations

An employee's supervisor completes an employee service rating or evaluation.

The employee is rated unsatisfactory, conditional, satisfactory, above satisfactory, or outstanding in the following areas:

(1) appearance;
(2) attendance;
(3) cooperation;
(4) dependability;
(5) health;
(6) initiative;
(7) knowledge of job;
(8) quality of work;
(9) quantity of work; and
10) safety.

The evaluation is routed through the next higher level supervisor and then to the institution's personnel manager for final review and filing.

VI. STATISTICAL EVIDENCE

A. Theoretical Approaches

The two theories which may be applied to a particular set of facts to show discrimination are disparate impact and disparate treatment. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

Liability for claims of disparate impact arise when a facially neutral employment practice imposes a harsher result on one group than another and cannot be justified by business necessity. A disparate impact plaintiff need not show intentional discrimination. Griggs v. Duke Power Company, 401 U.S. 424 (1971).

Disparate treatment is a type of discrimination where the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. The standards for evaluating classwide disparate treatment claims are found in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Hazlewood School District v. United States, 433 U.S. 299 (1977). The plaintiff has the burden of proving a prima facie case that defendant inten-

tionally discriminated against a protected class as its regular practice. Plaintiff may prove the prima facie case solely by statistics. Discriminatory intent or motive may be inferred by the statistics alone if the statistical disparity is great. Payne v. Travenol Laboratories Inc., 673 F.2d 798, 817 (5th Cir. 1982) (citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1971)). A plaintiff, however, may enhance his case by presenting evidence of the employer's history of discrimination or anecdotal testimony as to individual cases of discrimination. Payne, 673 F.2d at 817.

Once plaintiff has proved his prima facie case, defendant must rebut this showing by demonstrating that plaintiff's proof is either inaccurate or insig-

nificant. Teamsters, 431 U.S. at 360. If the employer fails to rebut plaintiff's case, there is a violation of Title VII. Teamsters, 431 U.S. at 361. The Teamsters' pattern of proof is appropriate for the §§ 1981 and 1983 claims as well as the Title VII claims. Payne, 673 F.2d at 818.

B. Plaintiffs' Statistical Case

Plaintiffs have primarily relied on statistics to prove their claims of discrimination. Dr. David W. Rasmussen, Professor of Economics at Florida State University, Tallahassee, Florida, testified for plaintiffs at trial. Dr. Rasmussen defined his task as determining in an analytical way if the FDOC has been drawing from the labor pool in a racially random way. Dr. Rasmussen used the 1970 census and the Department of Administration's register summaries to construct a

series of availability labor pools. He then tested his proxy availability pool of blacks against incumbents for statistical significance using the approximation to the binomial distribution test approved by the United States Supreme Court in Casteneda v. Partida, 430 U.S. 482 (1977). Plaintiffs' Exhibit No. D-1 amended. Dr. Rasmussen's benchmarks for his state workforce analyses ranged by .23 (Plaintiffs' Exhibit No. D-1 amended, Table 9) to .38 (Id., Table 2). This court will examine Tables 9 and 2 in detail.

TABLE 9

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year	Actual[38] Total	Black	Geographic Adjusted Bench-mark[39]
1972	1066	55	.23

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[38] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9), New hires from Plaintiffs' Exhibit A-11.

[39] Includes Service workers exclusive of private household, Farmers, all Laborers and all Operatives, earning less than $6000 in 1969, and having completed 12 to 15 years of education. Sources: 1970 Census of the Population, Table 175 and 176.

This benchmark includes occupational groups throughout the State, exclusive of Bay, Duval, Escambia, Franklin, Gulf, Hamilton, Holmes, Jefferson, Madison, Nassau, Okaloosa, Santa Rosa, Taylor, Walton, Washington, St. Jonns, Leon and Wakulla counties.

FY 1974-75	1648	202	.23
1977	2518	336	.23
1978	3119	461	.23
1979	3232	523	.23
1980	3488	618	.23
1981	3415	631	.23
NEW HIRES FY 77-78	1570	237	.23

Year	Expected Numberr of Black	Number of Std. Dev.
1972	245.18	13.84
FY 1974-75	379.04	10.36
1977	579.14	11.51
1978	717.37	10.91
1979	743.36	9.21
1980	802.24	7.41
1981	785.45	6.28
NEW HIRES FY 77-78	361.10	7.44

In Table 9 Dr. Rasmussen reached a .23 benchmark which reflects four factors: geography, occupation, income, and education. This proxy labor pool excludes people living in eighteen counties which are not adjacent to counties with major prisons. Dr. Rasmussen assumed that people would not commute from these eighteen counties to work at a prison as a correctional officer. The 23 benchmark includes only people from the 1970 census who listed their occupations as farmers, laborers, operatives, or service workers exclusive of private household. Dr. Rasmussen hypothesized that correctional officer applicants would most likely come from those occupational groups. The benchmark was also adjusted for income to include those groups whose median income was less than $6000. in 1969. In 1970 the

starting salary for a correctional officer was approximately $5600. Dr. Rasmussen assumed that persons in occupational groups earning more than an annual salary of $6000 would be unwilling to apply for a position as correctional officer and receive a lower salary. The last adjustment to the benchmark was for education Dr. Rasmussen included only those persons with twelve to fifteen years education because a high school diploma or a general education degree is a statutory requirement for correctional officers.

After considering these four factors, Dr. Rasmussen calculated the appropriate benchmark at .23 which means that black? comprised 23% of his proxy labor pool. Dr. Rasmussen theorized that if the FDOC drew from the labor pool in a racially random way, then 23% of its new

hires should be black.

Table 9 was the incumbent workforce because data on new hires is limited. When Dr. Rasmussen tested his proxy availability pool of blacks against incumbents, he found statistically significant underrepresentation of blacks in defendants' workforce.

TABLE 2

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year Only[41]	Actual[40] Total	Actual[40] Black	Income Adjusted Benchmark Males
1972	1066	55	.38
FY 1974-75	1648	202	.38
1977	2518	336	.38
1978	3119	461	.38
1979	3232	523	.38

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[40] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9).

[41] Includes Service workers exclusive of private household, all laborers, all operatives and farmers, earning less than $6000 in 1969. Sources: 1970 Census of the Population, Table 175.

1980	3488	618	.38
1981	3415	631	.38

Year	Expected Number of Black	Number of Std. Dev.
1972	405.08	22.09
FY 1974-75	626.24	21.53
1977	956.84	25.48
1978	1185.22	26.72
1979	1228.16	25.55
1980	1325.44	24.68
1981	1297.70	23.50

In Table 2, Dr. Rasmussen reached a .38 benchmark which reflects three factors: occupation, income, and gender. Dr. Rasmussen made the same assumptions concerning occupation and income as he did for Table 9. He also counted only males in this benchmark because he assumed most correctional officers were men. Considering these factors, Dr. Rasmussen's proxy population consisted of 38% blacks. When Dr. Rasmussen tested his availability pool of blacks against incumbents, he found an even greater underrepresentation of blacks as correctional officers in the FDOC's workforce.

Dr. Rasmussen also constructed a benchmark using data from defendants' register summaries. The Department of Administration maintains a register of persons who have completed applications for state employment and have stated a

class of positions or classes of positions of employment for which they are eligible and have an interest in applying. The register covers a four-year period beginning approximately October 8, 1977, and ending approximately October 8, 1981.

The Department of Administration processes all applications of applicants who are required to pass an examination. During the period covered by this report, the Department of Administration administered the Correctional Officer I examination only to those persons who were interested in becoming eligible for Correctional Officer I positions and met the age and education requirements. Data concerning applicants who fail the examination are purged from the register at the end of six months.

Data concerning applicants are deleted from the register upon specific request of the applicant, upon the expiration of a four-year period, or upon the expiration of a six-month period for applicants who failed the written examination. Information concerning an applicant remains on the register even though the applicant may have been hired, promoted, or otherwise become unavailable for employment in a class of positions.

This register is the data base for the statewide register summary. Plaintiffs' Exhibit No. A-1. The data contained in the statewide register summary is a report of the race and gender characteristics of all applicants who provided race and gender information. Only half of the applicants, however, provided this information.

The race and gender identifications of those persons are reported by class code number for each class of positions for which such persons requested that their eligibility be determined. Those persons who have applied for more than one class and for whom race and gender are available are reported in each class for which they have applied. Within each class, such persons are reported only once.

The register is also the data base for the county register summary. Plaintiffs' Exhibit No. A-2. This report contains race and gender information but also indicated one or more counties where the applicant was willing to work. Only 30% of the applicants provided this information. Those applicants who expressed a willingness to work in more than one county are reported in this

report in each such county in each class of positions for which they have applied; therefore, there would be multiple counting of those applicants.

TABLE 10

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year	Actual[42] Total	Actual[42] Black	Register State Benchmark[43]
1972	1066	55	.31
FY 1974-75	1648	202	.31
1977	2518	336	.31
1978	3119	461	.31
1979	3232	523	.31
1980	3488	618	.31
1981	3415	631	.31

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[42] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9).

[43] The benchmark is derived from Plaintiffs' Exhibit A-2, and is the proportion of black eligibles among all eligibles.

Year	Expected Numberr of Black	Number of Std. Dev.
1972	330.46	18.24
FY 1974-75	510.88	16.45
1977	780.58	19.16
1978	966.89	19.59
1979	1001.92	18.21
1980	1081.28	16.96
1981	1058.65	15.82

Dr. Rasmussen's register state benchmark was 31. Plaintiffs' Exhibit No. 2 shows that 31% of the applicants who sought eligibility for a Correctional Officer I position and who provided race and gender information and specified a county were black.

In Table 10 of Plaintiffs' Exhibit No. D-1 amended, Dr. Rasmussen tested his proxy applicant pool of 31% blacks against incumbent data. He found statistically significant underrepresentation of blacks in the Correctional Officer I position in defendants' workforce.

Approximately 10% of defendants' workforce is comprised of clerical workers. Dr. Rasmussen prepared tables on the clerical position using both the 1970 census and the register summaries.

TABLE 1

ANALYSIS OF PRIMARY CLERICAL CLASSES USING REGISTER BENCHMARK[44]

JOB TITLE	TOTAL[45]	BLACK[46]
1978		
Clerk Typist II	204	34
Secretary II	213	18
1979		
Clerk Typist II	168	33
Secretary II	208	18
1980		
Clerk Typist II	295	79
Secretary 11	217	25
1981		
Clerk Typist II	316	92
Secrerary II	215	23

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[44] Clerk typist II and secretaries II comprise between 38%-56% of the clerical workforce during all periods between 1972-1981, and 41% to 56% between 1978-1981.

[45] Number of total and black incumbents is taken from DOC Minority and Female Staffing Reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

[46] Number of total and black incumbents is taken from DOC Minority and Female staffing reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

JOB TIBLE	REGISTER BENCHMARK[47]	EXP BLK	NO.OF DEVS.
	1978		
Clerk Typist II	.32	65.28	4.69
Secretary II	.29	61.77	6.61
	1979		
Clerk Typist II	.32	53.76	3.43
Secretary II	.29	60.32	6.47
	1980		
Clerk Typist II	.32	94.40	1.92
Secretary 11	.29	62.93	5.67
	1981		
Clerk Typist II	.32	101.12	1.10
Secrerary II	.29	62.35	5.91

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47 Number of total and black incumbents is taken from DOC Minority and Female Staffing Reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

Using the statewide register summary, Dr. Rasmussen calculated the benchmark for the Clerk Typist II and Secretary II positions as .32 and .29 respectively. He compared this with incumbent data and found gross statistical disparities except for the Clerk Typist II position beginning in 1980. See Plaintiffs' Exhibit No. D-2, Table 1.

Dr. Alan A. Parrow, Director of Research at Hoffmann Research Associates, Inc. in Chapel Hill, North Carolina, also testified at trial as an expert for plaintiffs. Dr. Parrow analyzed gross hiring data which were set forth in the pre-trial stipulation (Document 166 %% F(10)-(12)).

	Total	White	Black
FY 1974-75			
Applications	3967	3092	861
Hires	1579	1300	268
FY 1976-77			
Applications	10,643	8389	1972
Hires	3212	2660	445

FY 1977-78			
Applications	9517	7312	1963
Hires	2405	1957	371

These data represent hiring for all positions with the FDOC and all applicants whether eligible or ineligible. Using the chi-square method, Dr. Parrow found that blacks were hired less frequently than whites and the results were statistically significant. See Plaintiffs' Exhibit No. D-10.

Dr. Parrow also testified about discrimination in promotions. Plaintiffs' Exhibit No. D-6 summarizes the correctional officer line of progression for each year when data were available. Plaintiffs' Exhibit D-6 demonstrates that blacks decrease in representation as one moves from lower level positions to higher level positions. Dr. Parrow used the Wilcox on two-sample test to determine whether the result was statistical-

ly significant. In each case Dr. Parrow found statistical significance exceeding two standard deviations.

FY	Total
Involuntary Terminations*	57
Voluntary Terminations*	480
Dismissals	89
Suspensions	25
Written Reprimands	104
Oral Reprimands	181

FY	Total
Involuntary Terminations*	198
Voluntary Terminations*	1889
Dismissals*	199
Suspensions	52
Demotions	21
Written Reprimands	246
Oral Reprimands	462

FY	Total
Involuntary Terminations*	115
Voluntary Terminations*	1626
Dismissals*	165
Suspensions*	101
Demotions	37
Written Reprimands*[48]	230
Oral Reprimands*[49]	333

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[48]* The Black and White columns do not add up to the total.

Information for Dade Correctional Institution is unknown and not included.

[49] Information for Dade, Desota, and Avon Park correctional Institutions is unknown and is not included.

FY	White	Black
Involuntary Terminations*	44	12
Voluntary Terminations*	415	64
Dismissals	52	37
Suspensions	16	9
Written Reprimands	81	23
Oral Reprimands	141	40

FY	White	Black
Total		
Involuntary Terminations*	138	58
Voluntary Terminations*	1609	239
Dismissals*	140	57
Suspensions	36	16
Demotions	21	0
Written Reprimands	177	69
Oral Reprimands	385	77

FY	Total	Black
Involuntary Terminations*	74	37
Voluntary Terminations*	1345	245[2]
Dismissals*	109	51
Suspensions*	74	26
Demotions	34	3
Written Reprimands*[50]	180	49
Oral Reprimands*[51]	261	69

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[50]* The Black and White columns do not add up to the total.

Information for Dade Corectional Institution is unknown and not included.

[51] Information for Dade, Desota, and Avon Park Correctional Institutions is unknown and is not included.

Dr. Parrow also analyzed the FDOC's imposition of discipline from the data contained in the pre-trial stipulation (Document 166 ¶¶ F(10)-(12)).

Dr. Parrow used the chi-square statistical tool to analyze the data. Plaintiffs' Exhibit No. D-9. He found that the level of statistical significance exceeded two to three standard deviations. Dr. Parrow testified that blacks received proportionately harsher discipline than whites and that the probability of chance occurrence of these results was less than one in ten thousand.

C. Defendants' Challenges to Plaintiffs' Statistics

Defendants contend that plaintiffs' benchmarks derived from the 1970 census are seriously flawed. Defendants' labor economics expert, Charles T. Haworth, Professor of Economics at Florida State

University, Tallahassee, Florida, testified at trial that plaintiffs' inclusion in the benchmark of only service workers, laborers, operatives, and farmers excluded many potential applicants. Dr. Haworth found that most correctional officer applications came from clericals. Although Dr. Rasmussen stated that he excluded clericals because mostly females were clericals, Dr. Haworth testified that in 1970, 2470 of the clericals were male. Dr. Haworth also thought it was erroneous to exclude all of the managerial and administrative category. That category is a broad one and would include, for example, a nineteen year old managing a small convenience store. Instead of excluding the entire category, Dr. Haworth would use a money criteria to eliminate those in the managerial and administrative

category earning over a certain annual salary. Dr. Haworth expressed a similar concern with plaintiffs' exclusion of the sales category. He again would include some in the sales category and eliminate highly paid salespersons. Dr. Haworth took issue with the fact that plaintiffs' benchmarks did not consider those leaving the military because several applicants and employees had prior military experience. A major flaw in plaintiffs' benchmarks, Dr. Haworth testified, was that unemployed applicants were not considered. In summary, Dr. Haworth stated that a more appropriate benchmark would include laborers, operatives, farmers, service workers exclusive of private household workers, clericals, part sales, and part managers and administrators with those leaving military service and the unemployed

factored into the benchmark.

Although Dr. Haworth did not compute such a benchmark, he offered evidence to prove that the benchmark would be a lower percentage of blacks than plaintiffs' benchmarks. Defendants' Exhibit No. 7-N, Table 3A. The groups excluded by Dr. Rasmussen that Dr. Haworth would include all have a lower percentage of blacks (2.8 - 5.9%) than the percentage of blacks in the labor force (14.9%) or the proportionate share of blacks represented in plaintiffs' benchmarks (23 - 38%). Additionally, to test the validity of plaintiffs' assumptions concerning the exclusion of some occupational groups, Dr. Haworth reviewed a sample of applications for the period 1979-81. See Defendants' Exhibit No. 7-J. He found that approximately 1/3 of the applicants came from groups that Dr. Rasmussen

excluded from his benchmark.

Dr. Haworth also disagreed with Dr. Rasmussen's removal of all persons in each category in which the median income of the category was more than $6000. Dr. Haworth points out that this procedure may exclude as many as 50% of the persons in that category who are in fact earning less than the median income. Dr. Haworth also sampled applications, Defendants' Exhibit No. 7-E, and testified that persons with incomes above what correctional officers earn did apply for correctional officer positions. On cross-examination, however, Dr. Haworth reviewed the underlying data for the sample, Plaintiffs' Exhibit Nos. I-600-6-03, and found that only two of twenty-six earned higher salaries.

Dr. Haworth also took exception to plaintiffs' exclusion of some occupation-

al categories that are primarily composed of females. Dr. Haworth reasoned that it would be more appropriate to weight the benchmark as to the relative proportion of females to males within these census categories than to totally exclude the groups.

Dr. Haworth testified that, in his opinion, the register summaries should not be used because they are unreliable. His first criticism is that the statewide summary and the county summary only represent 50% and 30% respectively of persons on the register. Dr. Haworth stated that the sample is not random because some people chose not to designate their race. He hypothesized that it would be likely for white persons not to state their race when the employer has an affirmative action plan. Dr. Haworth also stated that the summaries count

incidences of eligibility not people. Furthermore, persons who have failed the written examination and are thereby ineligible nevertheless remain on the register. Defendants conclude that the summaries overrepresent black eligibility.

Dr. Haworth opined that a major flaw in Dr. Rasmussen's tables was that he compared his benchmarks with incumbent data instead of actual hiring data. Defendants admit that actual hiring data are sparse. The record does show, however, that 15.2% of the new hires for correctional officers in fiscal year 1977-78 were black. Plaintiffs' Exhibit No. A-11. Twenty percent of persons hired as correctional officers in 1979 were black. Defendants' Exhibit No. 11-C. Plaintiffs' incumbent data, Plaintiffs' Exhibit No. D-1 amended, show

only 16.2% blacks. In 1980, 24.5% of the correctional officers hired were black. Defendants' Exhibit No. 11-D. Plaintiffs' incumbent data, Plaintiffs' Exhibit No. D-1 amended, show only 17.7% blacks. Defendants' workforce in 1972 was 5% black. This rate has increased to over 18% in 1982.

The incumbent data, therefore, understate the rate that blacks have been hired.

Dr. Haworth testified that Dr. Parrow's calculations with the gross statistics had little value. The analysis of the gross hiring statistics was weak because the raw data did not account for whether the applicants were qualified. The statistics were for the entire FDOC workforce and included a wide variety of occupations including doctors and other professionals where the black

availability rate is low.

Dr. Haworth also discounted the significance of the disciplinary action analysis. Dr. Haworth testified that it is proper to compare what should have happened with what actually happened. The gross statistics did not account for the type of offense or frequency of disciplinary problems with the employee.

Dr. Haworth also testified that Dr. Parrow's analysis on promotions had little value because it failed to consider the fact that fewer blacks than whites are eligible for promotions because of insufficient time on the job or comparable experience.

CONCLUSIONS OF LAW

I. STATISTICAL CASE

Plaintiffs have used both disparate impact and disparate treatment theories for their case with the primary thrust

directed toward the disparate impact of subjective decisionmaking. Defendants argue that except for the challenge to the written examination and high school diploma or equivalent requirement, the claims are disparate treatment claims. Plaintiffs do not assert that the FDOC applied distinct, facially neutral standards to its hiring, promotion, and disciplinary decisions. Plaintiffs, to the contrary, contend that the lack of objective criteria permits defendants to subjectively discriminate against blacks. Generally this subjective discrimination is analyzed under the disparate treatment theory. Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 816-17 (5th Cir. 1982); contra: Rowe v. Cleveland Pneumatic Company, 690 F.2d 88 (6th Cir. 1982). This court finds, however, that plaintiffs' statistical evidence is unper-

suasive under either theory.

This court is of the view that because plaintiffs' statistics are so flawed, plaintiffs have railed to establish a prima facie case. The court agrees with Dr. Haworth's attack on the 1970 census benchmarks. The major flaw is the exclusion of many occupational groups from which defendants showed several correctional officers were previously employed. This factor, in addition to the others mentioned by Dr. Haworth, casts grave doubt upon the credibility and reliability of plaintiffs' census benchmarks.

This court also finds that plaintiffs' register summary benchmarks are similarly unreliable. The register summaries, as Dr. Haworth pointed out, are non-random samples which contain information about both eligible and

ineligible persons.

Finally, the court takes issue with the fact that Dr. Rasmussen's tables compare these suspect benchmarks with incumbent data. This practice produces misleading results, especially when the employer has made rapid strides as the FDOC has in going from 5% to over 18% blacks in the workforce in ten years.

This court is of the view that Dr. Haworth also successfully discredited Dr. Parrow's statistics. The analyses of the gross data for hiring, discipline, and promotions failed to account for many variables, such as: whether the applicant was eligible, the type of behavior being disciplined, or the qualifications of the employee seeking a promotion. The analyses of the raw data are deficient for failing to recognize that several factors op=rate simultaneously to

influence decisions of hiring, discipline, and promotions. Thus, "the findings of statistically significant disparities derived therefrom will not permit an inference of discrimination." Pegues v. Mississippi State Employment Service, 699 F.2d 760, 770 (5th Cir. 1983).

Plaintiffs have argued that defendants had the burden of disproving plaintiffs' statistics with affirmative evidence, such as complete studies of their own. Defendants did attempt to put forth some of their own statistical studies, but the thrust of defendants' attack was to discredit plaintiffs' statistical evidence as unreliable. This court is of the view that defendants sufficiently proved that plaintiffs' statistics had little probative value Plaintiffs, therefore, never established

a prima facie case. See Equal Employment Opportunity Commission v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978); Cooper v. University of Texas at Dallas, 482 F. Supp. 187 (N.D. Tex. 1979), aff'd, 648 F.2d 1039 (5th Cir. 1981); and Dickerson v. United States Steel Corporation, 472 F. Supp. 1304 (E.D. pa. 1978).

II ANECDOTAL TESTIMONY

Plaintiffs sought to bolster their discrimination claims Through anecdotal testimony. Plaintiffs called approximately twenty witnesses who testified to individual acts of discrimination primarily in promotions, discipline, and job assignments. This court is of the view that plaintiffs still have failed to prove a prima facie case.

Some of plaintiffs' witnesses testified that they were denied promo-

tions based on their race. Defendants, however, rebutted most of the testimony by demonstrating the following nondiscriminatory reasons for the failure to promote employee ineligible for position sought (Whitfield Jenkins and Wilmatene Edwards) and employee's disciplinary record (Lester Kinsler and Zondra Harris). Other witnesses testified that they were discriminatively disciplined. Again, defendants advanced nondiscriminatory reasons such as failure to assist (William Turpin), taking money from an inmate (Walter Gray), and breach of security (William McCullough).

Testimony regarding discriminatory job assignments came from primarily eight witnesses representing three institutions (Florida State Prison: Larry Sullivan, William Turpin, and Mark Bevins; Glades Correctional Institution: Gwen Joseph,

Virgilee Graham, and Bobby Ray Hall; Apalachee Correctional Institution: Sam Jones and Kenneth Gibson). Defendants failed to adequately rebut the testimony on job assignment claims. Plaintiffs, however, presented no statistics on this issue and although the testimony was convincing, statements from eight people about three institutions is not sufficient to prove a claim of classwide discrimination against the FDOC.

III INDIVIDUAL CLAIMS OF NAMED PLAINTIFFS

A. Peners L. Griffin

Plaintiff Peners L. Griffin has filed an individual claim against the FDOC alleging discriminatory employment practices. Griffin has complained that he has not received a promotion during his eleven years of employment with the FDOC. In 1973 Griffin applied for a promotion as a Correctional Counselor II

at the Tallahassee Community Correctional Center. He did not receive this promotion; however, evidence was not presented about the person who was promoted. In 1974 plaintiff Griffin again applied for a promotion as a Correctional Counselor II. David Arthur, a white male, was selected. Mr. Arthur was an ex-offender and the FDOC had an affirmative action policy for ex-offenders in 1974.

Plaintiff Griffin has unsuccessfully applied for several other promotions. Richard Roberts, a black male, was a Chief Correctional Counselor at Tallahassee Community Center. He testified that on several occasions he had considered Griffin for promotion opportunities but had not recommended him because of Griffin's general uncooperative attitude and poor employment record.

John Holland, a white Chief Correctional Counselor at Tallahassee Community Correctional Center, has supervisory duties over plaintiff Griffin. Mr. Holland testified that he would not recommend Griffin for promotion because he considers Griffin to be an unreliable, uncooperative, and hostile employee.

Analyzing plaintiff Griffin's promotion claims under a variant form of the standard set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), this court finds that Griffin cannot prevail. The burden of proof is that plaintiff must show (1) that he belongs to a racial minority; (2) that he applied and was qualified for the promotion he sought; (3) that, despite his qualifications, he was rejected; and (4) that the employer selected an individual from a nonprotected class.

Then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection. Plaintiff thereafter has an opportunity to show that the employer's stated reason for the employee's rejection was in fact a pretext McDonnell, 411 U.S. at 802-04.

Plaintiff Griffin has shown that he belongs to a racial minority. His second amended complaint lists twelve promotions for which he applied and the court has detected at least one other position in his personnel file (Plaintiffs' Exhibit No. I-50 (Grif)). Although Griffin was not always qualified for the position (e.g. Inmate Classification Specialist in September 1974), he has proved that he was qualified for some of the positions [Correctional Counselor II). This court has no knowledge whether Griffin was

qualified for the other positions, but for the sake of this analysis will assume that he was qualified. Despite Griffin's qualifications, he has never been promoted. Griffin has proved that the FDOC selected a person in a non-protected class in some but not all of the cases. For instance, Griffin applied for a Correctional Counselor II position in January 1973, but plaintiff did not prove that the FDOC selected an individual in a non-protected class. Plaintiff did prove that in January 1974, he again applied for a Correctional Counselor II position and David Arthur, a white male, was selected With the above assumptions in mind, this court finds that Griffin did prove a prima facie case.

Defendants did prove that in January 1974, they selected an ex-offender as Correctional Counselor II in keeping with

their affirmative action policy for ex-offenders. Plaintiff never demonstrated that this reason was pretextual.

Griffin unsuccessfully applied for approximately ten promotions after December 17, 1974. Defendants advanced the reason that Griffin was not promoted because of his poor work record and attitude. This court finds that this reason is not a pretext. Although Griffin had been a satisfactory employee, his job performance was poor beginning in November 1974. His unsatisfactory record is evidenced by his performance evaluation dated December 17, 1974 (Plaintiffs' Exhibit No. I-50 [Grif)). This court has reviewed Griffin's personnel file excerpts and concludes that defendants have articulated a legitimate, nondiscriminatory reason for their failure to promote Griffin and plaintiffs have not

shown that the stated reason is merely a pretext.

Griffin also advances a claim of discriminatory or retaliatory discipline. On or about December 17, 1974, Wayne Scott, Chief Correctional Counselor at the Tallahassee Center, fired plaintiff Griffin. The following day plaintiff discussed this matter with Wayne Scott, Jerry Hicks, the Assistant Superintendent, and Robert Martin, the Personnel Manager. Assistant Superintendent Hicks reinstated plaintiff because the FDOC's termination procedures were not followed.

By letter dated January 27, 1975, plaintiff Griffin was informed that he was dismissed effective at the close of business on January 24, 1975. The letter stated seven reasons for his termination: (1) disobedience of order not to leave the Tallahassee Center to search for a

resident; (2) failure to comply with instruction to clean the Tallahassee Center; (3) inability to complete a routine form for approval for community release and furlough; (4) unauthorized personal use of official state vehicle; (5) refusal to participate in a disciplinary committee hearing; (6) use of a vehicle entrusted to a resident; and (7) insubordinate and deceitful behavior. Plaintiff successfully appealed his 1975 termination to the Career Service Commission which found that the FDOC failed to offer competent, substantial evidence to support Griffin's dismissal. Plaintiff Griffin was reinstated with back pay.

On January 24, 1975, the Equal Employment Opportunity Program Office received a complaint from Griffin which detailed both his December 1974 and

January 1975 dismissals. Donald M. Finley, a black male, investigated the complaint and found that discrimination was not a factor in Griffin's termination. See Plaintiffs' Exhibit No. I-50 (Grif), letter dated February 20, 1975, from Donald M. Finley. An Equal Employment Opportunity Program Office investigative report was issued on or about April 14, 1975. In part, the report states: "The above statistics tend to reflect that disciplinary actions have not been based upon race, but more likely, upon violations of regulations.... [T]he Equal Employment Opportunity Office finds no reasonable cause to believe that [Griffin] was discriminated against by [the FDOC] because of his race." This court finds that plaintiff's terminations were not racially discriminatory.

Griffin has been disciplined several times since his reinstatement. For instance, Griffin received a written reprimand for failing to pay for meal tickets. Griffin alleges that his white co-workers were not similarly disciplined. John Holland, Chief Correctional Counselor at the Tallahassee Center, testified that four whites and two blacks failed to pay for meal tickets. Each of the six individuals was placed on probation for six months, at which time the letters of reprimand would be pulled from their files. Griffin and Chalecki, a white officer, again violated the meal ticket policy and their reprimands remained in their respective files.

Griffin often complained to his superiors that he would be disciplined when white officers would not be disciplined. Holland testified that he

asked Griffin for the names of these other people, but Griffin has never provided this information. Plaintiff has not proven that he was treated differently because of his race.

B. Henry Dejerinett

In 1978, Henry Dejerinett applied for a position with the FDOC as a Property Manager III. The Department of Administration evaluated him, and Dejerinett received a score of 100 VP. James Vickers, a white male, interviewed Dejerinett. Kenneth Hayes, a white male, was selected. Mr. Vickers testified that he thought Mr. Hayes was more qualified than plaintiff Dejerinett because Mr. Hayes had experience in lease management, control, maintenance, and management of motor vehicles, and records management. Mr. Dejerinett testified that he did have experience in the areas of lease manage-

ment and records management but Mr. Vickers never asked him about it during the interview. Dejerinett did not assert that he was prevented from discussing his prior experience or in any manner given an unfair interview.

In 1980, Dejerinett applied again for a Property Manager III position with the FDOC. James Vickers and two other white supervisory employees interviewed Dejerinett. Gloria Thomas, a white female, was selected., however, Mr. Vickers ranked Dejerinett higher than the other two panel members.

Plaintiff has proven that he is a member of a protected class and that he applied and was qualified for the position. White persons were selected for the vacancies. This court finds that James Vickers did not select Dejerinett because he sincerely believed Kenneth

Hayes to be the best qualified applicant. Mr. Vicker's reason was legitimate and nondiscriminatory. At the worst, Mr. Vickers may be faulted for not being the best interviewer, but not for hiring in a racially discriminatory way.

Defendants have also articulated and proven a legitimate, nondiscriminatory reason for not hiring Dejerinett for the 1980 vacancy. James Vickers believed that Gloria Thomas, who had prior experience as a business manager at a state-operated facility for delinquent females, was more qualified than plaintiff Dejerinett. Dejerinett's individual claim for failure to hire must therefore fail.

PENDING MATTERS

I. HIGH SCHOOL DIPLOMA OR EQUIVALENT REQUIREMENT

Plaintiffs have challenged the statutory requirement that a correctional officer must be a high school graduate or its equivalent. See Fla. Stat. § 943.13 (1981). This issue was not tried during the trial. Instead, the parties took depositions (Documents 200-209) and then briefed the issue (Document 210, pp. 114-18; Document 211, pp. 28-53; and Document 21, pp. 16-25). The court has the issue of the validity of the high school diploma or equivalent requirement under advisement and will enter a separate order on this issue at a later date.

II. RELIEF

Plaintiffs have prevailed on one issue. This court granted summary

judgment and found that the correctional officer written examination utilized by defendants in screening applicants for correctional officer positions had a disparate impact upon class members which had not been justified by business necessity (Document 157). The parties, through their counsel, have represented to the court that they will make a good faith effort to settle any issue of relief.

III GRIFFIN'S INDIVIDUAL CLAIMS

Plaintiff Griffin has filed two pendent claims alleging lack of due process and malicious prosecution. (Second Amended Complaint, Counts II and III). The parties shall confer and then file a status report informing the court when the remainder of this case will be ready for trial.

An order to give effect to this opinion will be entered this date.

s/s August 25,1983 s/s William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

§ 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charles

shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State of local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,

the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which

the commission is authorized to take action with respect to the charge.

Supreme Court, U.S.
FILED
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CLERK

No. 87-1281

In The
Supreme Court of the United States
October Term, 1987

PENERS L. GRIFFIN, *et al.*,
Petitioners,

v.

RICHARD L. DUGGER, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondents perceive no need to restate the four "Questions Presented" by petitioners. However, respondents will only respond to the three points presented in the petition.

PARTIES TO THE PROCEEDING

The parties to this ongoing proceeding below are plaintiffs Peners L. Griffin and Henry L. Dejerinett; intervenors Alvin Smith and John D. Butler; defendants below are Richard L. Dugger, in his official capacity as Secretary, Florida Department of Corrections; The Florida Department of Corrections; Louie L. Wainwright, individually; and Raymond W. Gearey, individually.

However, the only parties properly before this Court are petitioners Griffin and Dejerinett; intervenor Smith; and the respondents Dugger and the Florida Department of Corrections.

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PREFACE REGARDING PARTY AND RECORD REFERENCES

Plaintiffs Griffin and Dejerinett will be referred to as "plaintiffs" or "petitioners," or by name as necessary. Intervenor Smith will be referred to as "intervenor," or by name. Defendants Dugger and the Florida Department of Corrections will be referred to as "defendants" or "respondents".

Respondents will cite to petitioner's appendix as "PA-" followed by the page number (*e.g.*, "PA-82a"). Citations to respondents' appendix will appear as "RA-" followed by the page number (*e.g.*, "RA-65").

Citations to the opinion below will be to the volume and page number where reported (*e.g.*, 823 F.2d 1476).

Citations to the record below will follow the Eleventh Circuit's format (*e.g.*, "R4-150-5"), where "R" means record," "4" is the volume, "150" is the document number, and "5" is the page number of the document.

No. 87-1281

In The

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PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard L. Dugger and Florida Department of Corrections respectfully request this Court to deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decisions in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 823 F.2d 1476 (August 7, 1987, as amended September 23, 1987). The order denying plaintiffs' petition for rehearing and suggestion for rehearing *in banc* is printed at RA-57 (October 30, 1987).

Petitioners have reproduced the opinion of the Eleventh Circuit in their appendix at PA-1a to 85a;[1] the original order of the district court certifying the class (entered March 12, 1981), is reproduced at PA-86a to 94a; the district court's order allowing the intervention of Alvin Smith (entered July 30, 1982) is reproduced at PA-95a to 110a; and the district court's memorandum opinion granting judgment for defendants on all claims heard except the testing claim (entered August 25, 1983) is reproduced at PA-111a to 188a.

Respondents have reproduced several additional documents pertinent to these review proceedings in their appendix. The district court's order directing judgment for defendants on all claims heard below (entered August 25, 1983) is reproduced at RA-1 to 3; plaintiffs' motion to alter or amend judgment (still pending) is reproduced at RA-4 to 7; the order appealed from, containing the required certificate allowing interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is reproduced at RA-8 to 14; the decision of the Eleventh Circuit is reproduced at RA-15 to 56; the order denying rehearing is reproduced at RA-57 to 58; plaintiffs' post-appeal motion for leave to amend complaint (filed February 10, 1988) is reproduced at RA-59 to 61; plaintiffs' post-appeal motion for leave to amend intervenor Smith's complaint is reproduced at RA-62 to 63; plaintiffs' post-appeal motion to intervene new parties is reproduced at RA-64 to 66; and plaintiffs' post-appeal motion to recertify class and request for evidentiary hearing is reproduced at RA-67 to 70 (all filed February 10, 1988).

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[1] Petitioners' appendix contains many typographical errors made in their reproduction process. Therefore, respondents have also reproduced the Eleventh Circuit's decision in their appendix, at RA-15 to 56.

JURISDICTION

Jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1254(1).

———o———

STATUTES INVOLVED

This is a Title VII case. The federal statute involved is Title VII of the Civil Rights Act of 1964, as amended, applicable to the states on March 23, 1972, presently codified at 42 U.S.C. § 2000e *et seq.*

———o———

STATEMENT OF THE CASE

This "across-the-board" class action was filed on October 15, 1979, by Peners L. Griffin on his own behalf and "on behalf of all past, present and potential black American citizens and residents who have been or may be employees of the defendants or applicants for employment." R1-1-2. Griffin sued Louie L. Wainwright in his official capacity, and the State of Florida, Department of Corrections, alleging race discrimination in employment under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* R1-1-1. Griffin mainly complained of defendants' failure to promote him, and for twice terminating him because of his race; he also claimed of harassment and retaliation from defendants. R1-1 through 4. Griffin did not advance any individual claim of discrimination in hiring.

However, in his "across-the-board" class claims, Griffin alleged that defendants discriminated against blacks in all aspects of employment, including recruiting, hiring, assignments, promotions, discipline and harassment, failing to advertise vacancies, maintaining a racially biased working environment, and "utilizing written entry level examinations and other qualifications and selection standards . . . which have a detrimental impact upon the plaintiff and his class." R-1-3, 4.

Defendants immediately and repeatedly objected to Griffin's attempt to represent applicants or bring class hiring claims, since he was an incumbent correctional officer employee and had no standing to raise any hiring issues. R1-5; R1-17; R1-21; R1-22; R1-30; R1-45; R1-49. Despite defendants' repeated objections, Griffin was allowed to amend his complaint twice, and to intervene plaintiff Harry L. Dejerinett as a named plaintiff and new class representative, to represent a hiring subclass of clerical job applicants. R1-25; R1-53. The district court ruled that Dejerinett's clerical failure-to-hire claim was encompassed by Griffin's general class hiring claim under the "across-the-board" theory. R1-53.

Griffin filed his Second Amended Complaint on December 15, 1980, adding Henry L. Dejerinett as a named plaintiff and as a class representative. R1-54-1. The Second Amended Complaint alleged a different class "of all past, present and potential black employees of the State of Florida Department of Corrections." R1-54-2. No mention was made of any applicant subclass. However, defendants filed their Amended Answer on January 19, 1981, preserving their objections to all correctional officer hiring claims. R2-66.

Based upon a stipulation between the parties, on March 10, 1981, the district court entered an order preliminarily certifying a class of "all past, present, and potential black employees of the State of Florida Department of Corrections." PA-86a to 88a. The stipulation was incorporated into the order, and was attached to the order as a part thereof. PA-86a. The stipulation provides, *inter alia*, that (1) the class certification was preliminary, and (2) was based upon plaintiffs' and the district court's perception of the law in the Fifth Circuit as then allowing such "across-the-board" class actions to proceed. Under the terms of the stipulation the defendants specifically preserved their rights to litigate and to appeal the disputed issues of standing and Rule 23 requirements, and other areas of disagreement. PA-89a to 94a.

On May 13, 1982, Griffin and Dejerinett filed their motion for partial summary judgment, attacking (among other things) the defendants' use of a written examination developed by the Florida Department of Administration (FDOA), and required by FDOA for use in hiring entry level correctional officers. R2-108-21 through 28. Defendants had repeatedly objected to litigating this issue and all other correctional officer hiring issues, because Griffin was an incumbent employee who had passed the test, and because Dejerinett was a clerical applicant and never had to take it.[2]

General Telephone Co. v. Falcon, 457 U.S. 147 was decided by this Court on June 14, 1982. Eleven days later,

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2 The FDOA has never been a party to these proceedings, and no one has ever filed a timely EEOC charge about FDOA's test, or about FDOC's use of it.

on June 25, 1982, defendants noticed their reliance upon *Falcon*, and moved to vacate the order certifying the class on July 8, 1982. R4-143.

Meantime, plaintiffs tried to avoid the force of *Falcon* by moving to intervene Alvin Smith, a correctional officer applicant who had failed the test in July 1981. However, Smith never filed a timely charge of discrimination with the EEOC. 823 F.2d 1481, note 8. Defendants objected accordingly. R4-145.

On July 28, 1982, the district court took up the two motions, and entered its order (1) denying the defendants' motion to vacate class certification and (2) granting Smith's motion to intervene. R4-150. Smith was allowed to intervene "as a matter of right" on his own behalf, and as "a proper representative for potential black employees." R4-150-5. The district court's order allowed the action to continue as an "across-the-board" class action with Griffin, Dejerinett and Smith collectively, as named plaintiffs representing the entire class of "all past, present, and potential black employees of the State of Florida Department of Corrections." R-4-150-6. Then two days later, on July 30, 1982, the district court ruled on Griffin's and Dejerinett's motion for partial summary judgment, without any hearing. The district court's order granted declaratory relief only on the correctional officer written examination issue. The district court found "that the correctional officer written examination utilized by defendants in screening applicants for correctional officer

positions has a disparate impact upon class members which has not been justified by business necessity." R4-157-5.[3]

Trial was held over the five-week period beginning August 17, and ending September 17, 1982. R5-196. The parties submitted extensive post-trial motions and memoranda. R5-195; R5-197; R6-210; R6-211; R7-212; R7-213; R7-214; R7-215.

On August 25, 1983, the district court filed its Memorandum Opinion. PA-111a to 188a. Judgment was entered for defendants on all issues presented at trial. RA-1 to 3. The district court also brought forward its earlier summary judgment (R4-157, July 30, 1982) and entered judgment for plaintiffs on the single issue of the correctional officer written examination, and left several issues including relief pending.[4] RA-2 to 3.

Plaintiffs moved to alter or amend the judgment on September 8, 1983. RA-4 to 7. Defendants responded on September 16, 1983. R7-225. The motion is still pending in the district court.

Plaintiffs moved to commence stage II (relief on the testing issue), R7-233, and defendants again objected, and filed additional supporting documents. R7-234, R8-239,

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3 The EEOC has never seen the test, nor had the district court seen it prior to the ruling. Plaintiffs "won" on statistics alone, and defendants never had an opportunity to show job relatedness, business necessity or argue the merits of the test. The test was abolished in 1983.

4 All matters are still pending in the district court.

R8-240. Plaintiffs responded. R8-242. The parties were unable to agree, and asked for permission to appeal.

The issue of relief to the class of black persons who took and failed the correctional officer written examination was left pending, while the parties agreed to seek interlocutory appeal of the controlling issues of law regarding jurisdiction, and Rule 23. The district court adopted the plaintiffs' position on notice relief in its order dated October 3, 1985, and included the required certificate for purposes of the appeal. RA-8 to 9. The Eleventh Circuit granted the interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and vacated the district court's orders. Plaintiffs now seek review of the Eleventh Circuit's decisions.

STATEMENT OF THE FACTS

Respondents adopt the findings of fact set forth in the district court's Memorandum Opinion entered August 25, 1983, (PA-116 to 188a), and the findings of the Eleventh Circuit Court of Appeals (823 F.2d 1476-1494), as their Statement of the Case.

Accordingly, respondents find it necessary to correct or clarify some of the statements made by petitioners in their Statement of the Case.

Peners L. Griffin was an entry level correctional officer (CO I) seeking promotions at FDOC. He was never promoted, and claimed race discrimination as the reason. Griffin was also disciplined many times, even fired twice,

giving rise to his other individual claims, arising in 1974. 823 F.2d 1479.

Griffin filed an EEOC charge in February 1975, claiming individual race discrimination in promotions, discipline and terminations. R4-148. He also mentioned the word "hiring". There is no evidence that his charge was ever fully investigated by the EEOC, nor is there any evidence as to the scope of the EEOC's investigation, if there was one. Griffin himself said there was not. R1-21; R1-22; R1-23; R1-24. Moreover, it is undisputed that the EEOC has never seen the Correctional Officer I test, and undisputed that the district court never saw the test prior to ruling that it had a disparate impact on blacks. Respondents have thus been denied their rights to conciliation under Title VII, as well as denied a fair opportunity to litigate the merits of the test below.

Therefore, contrary to petitioner's statement on page 9 of the petition, the district court's "substantive determination" on the test is in issue; in fact, that ruling has also been vacated by the Eleventh Circuit's decision, by operation of law. Plaintiffs have lacked standing to raise that issue from the beginning, as the Eleventh Circuit has found.

Plaintiffs moved for summary judgment without standing, on the issue of disparate impact of the CO I test on May 13, 1982, some two months *before* Smith intervened. Defendants responded, preserving their continual objections. R3-120. *Falcon* was decided June 14, 1982. Defendants immediately noticed their reliance on *Falcon*, again objecting to plaintiff's lack of standing and failure to meet Rule 23 requirements, on June 25, 1982. Hearing

nothing from plaintiffs or the district court, defendants moved to vacate the order certifying class, on July 8, 1982. 823 F.2d 1480; R4-143.

Plaintiffs moved to intervene Smith, to save the objective testing claim. R4-141. The district court recognized that defendants had been right all along. PA-102a, 103a and 107a. However, instead of vacating the improperly certified class, the district court allowed Smith to intervene on the eve of summary judgment, solely to save the objective class hiring claim which plaintiffs never had standing to raise in the first place. Smith's objective claim was then adjudicated on plaintiff's earlier motion for summary judgment, two days later, on July 30, 1982. 893 F.2d 1481. The Eleventh Circuit Court of Appeals has reviewed all these facts and has vacated the district court's orders. 893 F.2d 1484 and 1493.

All of Griffin's individual Title VII claims of subjective discrimination in promotions, discipline, retaliatory discipline, and terminations were resolved against him at trial. RA-1. Likewise, all of Dejerinett's individual subjective hiring claims were resolved against him at trial. *Id.* Finally, Griffin and Dejerinett together lost all their subjective class claims of race discrimination, including hiring, at trial. RA-1. The single issue won by plaintiffs below was the objective testing claim regarding the disparate impact of the correctional officer test advanced by intervenor Alvin Smith. 823 F.2d 1481.

Alvin Smith took and failed the CO I test in July 1981, over six years after Griffin's claims arose. 823 F.2d 1480, 1481. However, Smith never filed a timely EEOC charge about the test, and consequently never exhausted administrative remedies either. The EEOC has never in-

vestigated, reviewed or even seen the CO 1 test, because no one has ever filed a timely charge regarding it, and the test was abolished in 1983.[5]

Nevertheless, the district court excused Smith's failure to exhaust administrative remedies, ruling that Griffin's 1975 subjective promotion and discipline claims were sufficiently similar to Smith's 1981 objective testing claim, under the Fifth Circuit's "single-filing rule" announced in *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). The Eleventh Circuit Court of Appeals has ruled otherwise. 893 F.2d 1492-93.

All of petitioners' alternative standing arguments and all of their administrative exhaustion tolling arguments were presented to the Eleventh Circuit Court of Appeals in their briefs and petitions for rehearing and suggestions for rehearing *in banc*, filed by plaintiffs and by the EEOC, which intervened on their behalf in the rehearing proceedings below. The Eleventh Circuit Court of Appeals has reviewed the authorities and arguments advanced in this petition, and has denied rehearing. RA-57.

Finally, these petitioners are presently back before the district court as plaintiffs, now attempting to amend their complaint, amend the intervenor Smith's complaint, moving to intervene new parties and new class representatives, and seeking recertification of the vacated testing class. RA-59; RA-62; RA-64; and RA-67.

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5 Actually, there was more than one FDOA test. The test that Griffin took and passed was abolished in 1972, and was ultimately replaced in 1976 with the test that Smith failed in 1981. R7-234, R8-239, R8-240. The district court was made aware of these important facts in the post-trial dispute over standing and failure to exhaust remedies, and allowed the interlocutory appeal to settle the dispute. RA-8, 9.

REASONS FOR DENYING THE WRIT

Introduction

The court of appeals' decision below was rendered in the alternative. First, Griffin was found to lack Article III standing to assert the objective testing claim in the federal courts. Thus, the Eleventh Circuit held that "the district court erred when it permitted Griffin to raise the testing claim on behalf of himself and on behalf of others." 893 F.2d 1484.

Alternatively, the court of appeals held that, "even if Griffin somehow had constitutional standing to assert the testing claim, he did not, in light of *General Tel. Co. v. Falcon* . . . (citations omitted) have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired." 823 F.2d 1484, and n.17.

Petitioners here focus only on the first of the two alternative holdings below. Petitioners do not seek review of the court's decision finding Griffin to be an inadequate class representative and holding that Rule 23 requirements were not met. In fact, petitioners concede that issue, on page 32 of their petition.

Accordingly, this Court should deny the writ since the court of appeals' decision would be affirmed on the alternative grounds. *Belcher v. Stengel*, 429 U.S. 118 (1976); *Dayton Board of Education v. Brinkham*, 433 U.S. 406, 419 (1977); *Blum v. Bacon*, 457 U.S. 132, 137 (1982).

I. Question 1.

The court of appeals correctly held that plaintiffs lacked Article III standing to assert the testing claim in

the federal courts. The petitioners erroneously assert that the court of appeals has thus imposed a new requirement on plaintiffs to have constitutional standing to file a charge of discrimination with the EEOC. That is not correct.

The court of appeals' decision is correct, and is in accord with decisions of this Court, and other circuit courts of appeals. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Allee v. Medrano*, 416 U.S. 802, 829 (1974); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981); *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1977), *cert. denied*, 439 U.S. 835 (1978); *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1983); *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395 (1977); *Hill v. Western Electric Co., Inc.*, 596 F.2d 99 (4th Cir. 1979); *Snyder v. Harris*, 394 U.S. 332 (1969); *Alvarez v. Pan American Life Insurance Co.*, 375 F.2d 992 (5th Cir. 1967).

Petitioners cite no authority supporting their view that the statutory "standing" provisions of Title VII (which allow "any person claiming to be aggrieved" to file a charge with the EEOC) take precedence over or expand the constitutional requirement of standing applicable to the federal courts. In fact, petitioners even argue that *Steward v. Hannon*, 675 F.2d 846 (7th Cir. 1982) held that congress intended to define Title VII standing only "as broadly as the Constitution permitted." *Petition*, p.18. That is the result reached by the Eleventh Circuit in this case. The other cases cited as "conflicting" do not conflict either. They say the same thing.

In the main cases relied upon by petitioners, the courts clearly held that the exhausting plaintiffs could charge discrimination and sue, but only on their *own* claims, not on the claims of others. *See, Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980). The Fifth Circuit's 1980 conclusion in *Mississippi College*, based entirely upon the rationale of *Trafficante* and without benefit of *Falcon*, is precisely on point with respondent's position here:

> We conclude that § 706 of title VII permits Summers to file a charge asserting that Mississippi College discriminates against blacks on the basis of race in recruitment and hiring. *Our decision today does not allow Summers to assert the rights of others. We hold no more than that, provided she meets the standing requirements imposed by Article III*, Summers may charge a violation of her own personal right to work in an environment unaffected by racial discrimination.

616 F.2d 477, 483 (Emphasis supplied).

Petitioners cite no authority to support their view that the "single-filing rule" can or should be used to circumvent Article III standing. It cannot, as the Eleventh Circuit correctly held. 823 F.2d at 1493.

Petitioners have adequately described the single-filing rule in note 4 of their petition (on pages 13 and 14):

> The single-filing rule provides that where one plaintiff has filed a valid EEOC charge, *individuals with claims arising out of similar discriminatory treatment in the same time frame* may proceed in court without satisfying the filing requirement. "It would be wasteful, if not vain, for numerous employees, *all with the same grievance*, to have to process many iden-

> tical complaints with the EEOC". *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). The rule "presupposes, of course, that the subsequent claims are *sufficiently similar to the original complaint* and the *employer received adequate notice* and an *opportunity for conciliation*". *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2nd Cir. 1986). (Emphasis supplied).

Petitioners' description clearly supports the holding of the Eleventh Circuit. The court compared Smith's 1981 objective testing claim with Griffin's 1975 subjective decision-making claims, and correctly concluded that Griffin and Smith were not "similarly situated", because "employee Griffin's and applicant Smith's claims did not arise out of similar discriminatory treatment." 823 F.2d 1493.

The Eleventh Circuit's holding does not require anything more than what the single-filing rule has always required: "similar discriminatory treatment in the same time frame", so as to be sure the "employer received adequate notice and an opportunity for conciliation." *Petition*, note 4, pp. 13, 14. Plaintiffs below have repeatedly ignored and have sought to avoid proper exhaustion of administrative remedies, from the very beginning of this case. They merely argued that Griffin's 1975 subjective practices EEOC charge can form the basis of an across-the-board class action, with no need for anyone, anytime, ever to exhaust remedies on Smith's objective testing claim which arose six years later, in 1981. The Eleventh Circuit is correct, and the decision is in accord with other courts of appeal. *Dalton v. Employment Security Commission of North Carolina*, 671 F.2d 835, 838 (4th Cir. 1982), *cert. denied*, 459 U.S. 862 (1982); *Vuyanich v. Re-*

public National Bank of Dallas, 723 F.2d 1195, 1201 (5th Cir. 1984), *cert. denied* 469 U.S. 1073; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1246 (7th Cir. 1983); *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376, 1381 (11th Cir. 1983).

The court of appeals' decision is not in conflict with the decisions of this Court, nor in conflict with any other cases relied upon by petitioners. This Court should deny the writ.

II. Question 2.

Petitioners now admit that in light of *Falcon*, Griffin could not represent the class of persons who failed the correctional officer written examination. *Petition*, p. 32. Respondents have known and argued that fact since 1979, when Griffin filed this suit. Accordingly, the parties now are in agreement that the testing subclass was improperly plead by Griffin, improperly certified, and improperly recertified in the district court. Griffin always was and still is an inadequate class representative. Therefore, the Eleventh Circuit's order vacating the improperly certified class is correct, and petitioners should have no quarrel with that order, under *Falcon*.

However, to avoid the effect of the Eleventh Circuit's mandate, and in order to side-step this Court's clear holding in *Falcon*, petitioners are now attempting to replead Griffin's case below under a new across-the-board theory, hoping to create Article III standing where none was found to exist. *See* plaintiffs' motion for leave to amend complaint, RA-59; plaintiffs' motion for leave to amend intervenor Smith's complaint, RA-62; plaintiffs'

motion to intervene new parties, RA-64; and plaintiffs' motion to recertify class and request for evidentiary hearing, RA-67.

The petitioners here present the same authorities as they do as plaintiffs below. They argue that Griffin, as an *incumbent* employee, could have charged a violation of Title VII based upon his allegations of a "discriminatory working environment", and thereby create Article III standing for himself so as to represent *applicants*, who by definition are not injured by that alleged discriminatory working environment, because they are not working in it. Petitioners' novel theory must fall of its own weight. *See*, 823 F.2d 1484, note 17. Petitioners are clearly attempting to resurrect the Fifth Circuit's old "across-the-board" approach to Title VII litigation, notwithstanding *Falcon* and all its progeny. However, petitioners cite no post-*Falcon* cases to support their desire to return to yesteryear.

Instead, they present their new theory and its intended effect in a statement which is a complete misunderstanding and misapplication of *Falcon*, on page 37 of the petition. Petitioners assert that "[t]he impact of *Falcon* on this process is that in order to sustain a subsequent across-the-board class action in federal court, the original charging party must be joined at the litigation stage by an additional class representative who not only has broad Article III standing to litigate the general issue, but is specifically appropriate to represent absent class members who may have suffered a more direct injury from the same policy."

Respondents submit that petitioners' view of the *Falcon* rule of law is incorrect and is without merit. This

Court should reject petitioners' unsupported view and deny the writ.

III. Question 3.

Petitioners' last point regarding tolling was never presented to the district court. The district court knew that Smith had not exhausted, but erroneously allowed Smith to intervene anyway, relying upon Griffin's 1975 EEOC charge to excuse Smith's lack of exhaustion of administrative remedies under the single filing rule. PA-108a, 109a. Consequently, no one ever exhausted, and there is no plaintiff now capable of exhausting remedies on the test.

The Eleventh Circuit correctly held that the district court abused its discretion by allowing Smith's intervention solely to save the testing claim, because Griffin had no standing to bring it in the beginning. 823 F.2d 1492, 1493; *accord, Wakeen v. Hoffman House Inc.*, *supra*, 724 F.2d at 1246; *Vuyanich v. Republic National Bank of Dallas*, *supra*, 723 F.2d at 1201; *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, at 928-929, and note 6 (11th Cir. 1983); *Brown v. Sibley*, *supra*, 650 F.2d at 771.

The same tolling arguments and authorities advanced here were also advanced in support of plaintiffs' and the EEOC's petitions for rehearing and suggestions for rehearing *in banc*, denied on October 30, 1987. RA-57. The decision of the Eleventh Circuit does not conflict with this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), or *United Airlines v. McDonald*, 432 U.S. 385 (1977), or *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983).

The holdings in these cases *presume* that the class action allegations in a complaint filed in federal court

are legitimate class allegations brought by someone who has Article III standing himself. "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano, supra*, 416 U.S. at 829 (1974) (BURGER, CJ, concurring); *Brown v. Sibley, supra*, 650 F.2d at 771.

However, in this case Griffin never had standing to raise the objective testing claim, and neither did Dejerinett. Accordingly, since there has never been a proper class pled or certified here, the Eleventh Circuit properly *vacated* the district court's orders, which are thus void *ab initio*. *See Falcon v. General Telephone Co.*, 815 F.2d 317 at 320 (5th Cir. 1987). There never was a class, as a matter of law.

The rules announced in *American Pipe* and *Crown, Cork & Seal* presume a valid class action, and therefore properly allow similarly situated persons and proper putative class members to intervene or bring individual actions upon a subsequent *denial* of class certification. In such proper cases, this Court has held that the statutes of limitations applicable to actions brought in the federal courts may be tolled for proper class members during the pendency of the class certification proceedings. Likewise, in *United Airlines* this Court has allowed proper putative class members to await entry of final judgment before intervening for purposes of appealing the denial of class certification. This case does not disturb those rules of equity.

In this case, Smith was allowed to intervene solely to create subject-matter jurisdiction over the objective testing claim, where none existed before. There never was a valid class action alleged or certified here. Therefore, unlike *American Pipe* and the other cases, intervenor

Smith had no valid class action into which to intervene. Petitioners cite no authority allowing federal courts to create or enlarge their jurisdiction by allowing intervention of non-putative class members, at any stage of the proceedings. *See Vuyanich v. Republic Nat'l Bank, supra*, 723 F.2d at 1201.

More importantly, in *Crown, Cork & Seal* the intervenor Parker was clearly a member of the putative class, and was independently able to sue on the same issues raised by the plaintiffs in their class action. Parker had already filed a timely EEOC charge and had fully exhausted his administrative remedies; he was awaiting his notice of right to sue *before* the class action was filed. 462 U.S. at 347. Therefore, when class certification was denied, Parker still had his statutory 90 days in which to intervene in the action, or file his own individual action. 462 U.S. at 354.

By comparison, applicant Smith was clearly not a member of Griffin's incumbent correctional officer class, nor was he a member of Dejerinett's clerical class. And unlike Parker, Smith had never filed a timely EEOC charge nor exhausted his Title VII administrative remedies, and could not have filed his own lawsuit. Thus Smith was neither a proper class member nor a proper intervenor, and the tolling rules do not apply to him.

There are other reasons why the tolling rules do not apply to Smith. Griffin's subjective claims arose in 1974, and he filed his class action in 1979. Smith's objective testing claim did not even arise until he took and failed the test, in July 1981, *seven years after* Griffin's claims arose. Smith then slept on his rights another year, until

July 1982, when he attempted to file an EEOC charge and intervened to save the testing claim. However, since Smith had waited a year to file his charge, the EEOC dismissed it for lack of jurisdiction. Therefore, Smith was out of time at the EEOC *before* he intervened, and there is no time left to toll.

Petitioners seem to believe that *Crown, Cork & Seal* excuses Smith's failure to exhaust administrative remedies, or somehow tolls the time in which Smith may file an EEOC charge. That view is incorrect. The tolling rules apply to time limits for seeking federal court interventions, or for filing new federal court actions, or for taking federal court appeals, not to the EEOC's administrative 180 day filing period. In effect, petitioners have asked this Court to overrule the EEOC's 1982 determination that Smith's charge was untimely filed. Petitioners cite no authority for their novel request.

Petitioners' expansive view of the tolling rules would encourage anyone to file a spurious class action, and thereby toll the time or excuse the need for filing EEOC charges altogether, for all asserted members of the spurious class for years, even decades. (Griffin's claims arose fourteen years ago.) Petitioners cite no authority to support their novel theory of open-ended Title VII class action litigation, because there is none.

Several members of this Court have warned against this kind of abuse of the tolling rules. *See* concurring opinion of Justice BLACKMUN, in *American Pipe & Construction Co. v. Utah, supra*, 414 U.S. at 561; *also see*, concurring opinion of Justice POWELL, with whom Justice REHNQUIST and Justice O'CONNOR joined, in *Crown, Cork & Seal v. Parker, supra*, 462 U.S. at 354, 355.

Finally, the holding of this Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), which basically sanctioned the single filing rule, is not in conflict either. In *Zipes*, the issue was whether *all* putative class members had to file timely EEOC charges in order to share in the relief already obtained by the 30 women who apparently had filed timely charges. In this case administrative remedies have never been exhausted on the testing issue by anyone. Petitioners cite no authority holding that Title VII class liability can be established, or that class relief can be given in the absence of a proper class representative who has standing and has exhausted remedies on the underlying class claim.

Respondents have always denied all allegations of exhaustion of administrative remedies, and have repeatedly objected to plaintiffs' lack of Article III standing to litigate the testing claim, from the beginning. Had they listened, petitioners might have found someone with standing, and then could have exhausted administrative remedies; but they did not do so. Instead, plaintiffs and intervenor Smith have intentionally avoided their requirement to exhaust Title VII administrative remedies for years, and cannot do so now.

Therefore, it is far too late in this litigation for petitioners to demand equitable waiver of the necessary condition precedent which they intentionally ignored for years, to their own detriment. Smith has not and cannot allege that "all conditions precedent have been fulfilled", as required. 823 F.2d at 1482, n.12, and 823 F.2d 1492; *Jackson v. Seaboard Coast Line RR*, 678 F.2d 992, 1010, 1011 (11th Cir. 1982). There is no conflict with *Zipes*.

The Eleventh Circuit has reviewed all the facts, considered all the authorities and all of petitioners' arguments, and has properly vacated the district court's orders below. Therefore, this Court should deny the writ.

CONCLUSION

Because the questions raised by petitioners present no conflict with decisions of other federal courts of appeals on the same subject matter, no conflict with applicable decisions of this Court, and no important questions of federal law which have not been but should be settled by this Court, respondents respectfully request that plaintiffs' petition for writ of certiorari be denied.

Respectfully submitted,

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April 1988

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN and HENRY L. DEJERINETT,

Plaintiffs,

and

ALVIN SMITH,

Intervenor,

all individually and on behalf of all others similarly situated,

v.

LOUIS L. WAINWRIGHT, individually and in his official capacity as Secretary of the Department of Corrections of Florida; THE STATE OF FLORIDA; THE DEPARTMENT OF CORRECTIONS, and any predecessor or successor agency; and RAYMOND W. GEARY, individually and in his official capacity as attorney for the Department of Corrections of Florida,

Defendants.

TCA 79-1016-WS

ORDER

(Filed Aug. 25, 1983)

In accord with a Memorandum Opinion of this date, it is ORDERED:

1. This action is hereby finally certified as a class action with Peners L. Griffin, Henry L. Dejerinett, and

Alvin Smith as named plaintiffs and intervenor representing a class of all past, present, and potential black employees of the Florida Department of Corrections. The only employees barred from the class are those who left the employ of the Florida Department of Corrections more than 300 days before the filing of Griffin's 1975 charge.

2. Judgment is for the defendants on the class claim that since March 24, 1972, the Florida Department of Corrections has discriminated and continues to discriminate in its policies and practices against past, present, and potential black employees.

3. Judgment is for the defendants on plaintiff Peners L. Griffin's individual claim of racially discriminatory employment practices.

4. Judgment is for the defendants on plaintiff Henry L. Dejerinett's individual claim of racially discriminatory hiring practices.

5. Judgment is for the plaintiffs on the issue that the correctional officer written examination previously utilized by defendants has an adverse impact on class members and is not justified by business necessity.

6. The parties shall meet in a good faith effort to settle the form of relief for the court's finding of liability regarding the correctional officer written examination. The parties shall report to the court no later than thirty working days from the date of this order whether they were able to settle this issue or if not, their suggestion as to the best way to proceed on this issue.

7. The parties shall file a status report no later than thirty working days hence informing the court when Counts II and III will be ready for trial.

8. The parties will likewise advise the court within thirty working days of this order whether they have been able to resolve the issue and amount of attorney's fees.

9. The Clerk of the Court will enter judgment accordingly.

DONE AND ORDERED this 25th day of August, 1983.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PEXERS L. GRIFFIN, et al., etc., Plaintiffs,	)	Case No. TCA-79-1016
vs.	)	
LOUIE L. WAINWRIGHT, etc, et al., Defendants.	)	(Filed Sept. 8, 1983)

MOTION TO ALTER OR AMEND THE JUDGMENT

Plaintiffs move the Court for an order altering or amending the judgment in this case in the following respects, and state:

1. The judgment entered by the Court in this case should be vacated, since Rule 54 precludes the entry of judgment as to fewer than all of the claims and all of the parties, unless the Court has made an express determination there is no just reason for delay. The Court has not made such an express determination, and it would be an extraordinary burden upon all of the parties to have this case piecemeal among the district and appellate courts. Moreover, unless the judgment is vacated these proceedings may become further complicated by the necessity for prudent counsel to file a purely protective appeal.

2. The Court has completely overlooked Plaintiff Butler in its opinion, order, and judgment. Mr. Butler's claims were largely uncontested by the Defendants.

3. Plaintiff Griffin presented a number of distinctly different claims to the Court for adjudication. The

Court's opinion does not address most of these. These claims are outlined in Plaintiffs' proposed findings of fact and conclusions of law.

4. The Court is bound by decisions of the United States Supreme Court. Moreover, this circuit operates under the rule of binding precedent. Some of the Court's statistical analyses violate rules of the United States Supreme Court and binding precedent of the Eleventh Circuit Court of Appeals. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court held a plaintiff may prove a prima facie case of discrimination by comparing incumbent employees with the reasonably available labor pool. The burden then shifts to the Defendant to rebut the showing by demonstrating Plaintiff's proof is either insignificant, or the Defendants' hiring practices have been racially neutral during the liability period. In this case, utilizing Dr. Haworth's availability pool of 15 to 16 percent, liability is demonstrated through fiscal 1977-78. If one compares the incumbent workforce in June of 1977 (Plaintiffs' Exhibit A-5) with the percentage of blacks Dr. Haworth believed to be in the reasonable labor pool, statistically significant disparities are shown:

	Total	Black	Benchmark	No. of Standard Deviations
CO 1	2518	336	.153	2.73

As a benchmark, I've used 15.3 percent, the percentage of blacks in Florida's population, from the 1970 census. Either 15% or 16% produces similar results. Under *Teamsters* the burden of showing racially neutral hiring during the liability period was the Defendants. They did not meet this burden.

Results are the same for earlier periods. Plaintiffs' Exhibits A-3 and A-4 give the following results:

	Total	Black	Benchmark	No. of Standard Deviations
1972	1066	55	.153	9.20
Fiscal Yr 1974-75	1648	202	.153	3.43

The Court also rejected gross hiring data produced by Plaintiffs. This rejection by the Court violates binding precedent of this circuit. The Defendants were under a statutory duty to maintain accurate hiring data. Their failure to do so should not bring disrepute upon the Plaintiffs' case. In *Fisher v. Proctor and Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980), the Defendant attempted to defeat statistical data by arguing it was Plaintiffs' responsibility to prove the percentage of blacks with the necessary skills and qualifications among applicants. The Court held:

> Mindful of Hazelwood we nevertheless find that the Plaintiffs' statistics are adequate to establish a prima facie case. First, a prima facie case may be shown without evidence of qualifications where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force. (citations omitted).
>
> *Fisher* at p. 5444.

The incumbent data, even using Defendants' expert estimate of the available labor pool, shows a compelling level of discrimination in a sizeable workforce. Although the Defendants failed to meet their statutory duty to preserve hiring data, the data they did maintain shows a compelling

level of racial underrepresentation in a sizeable workforce. To hold otherwise is contrary to binding precedent of this circuit.

SUPPORTING MEMORANDUM

The foregoing discussion adequately meets the local rule requirement for a supporting memorandum. However, these issues have been briefed in Plaintiffs' proposed findings of fact and conclusions of law, and in the Plaintiffs' most recent motion for partial summary judgment, filed at the conclusion of the statistical stage, filed September 7, 1982.

Respectfully submitted,

/s/ Jerry G. Traynham
Jerry G. Traynham

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by prepaid U.S. Mail to Bruce A. Minnick, Esq., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301, this 6th day of September, 1983.

/s/ Jerry G. Traynham
Jerry G. Traynham

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN, et al., etc.,	)	
Plaintiffs,	)	
vs.	)	
LOUIE L. WAINWRIGHT, etc., et al.,	)	Case No. TCA 79-1016
Defendants.	)	

ORDER

(Filed Oct. 3, 1985)

In its Order entered August 25, 1983, this Court reaffirmed its earlier ruling of July 30, 1982, regarding the illegality of the use by the Defendants of the Correctional Officer I written examination and directed the parties to meet in a good faith effort to settle the form of the relief. In status conferences held November 8, 1983, and September 11, 1985, the Court inquired as to the initial steps recommended by the parties for Stage II individual relief procedures. The Court is now satisfied that the following procedures are appropriate.

IT IS NOW ORDERED:

1. The present subclass for purpose of determination of individual relief from the effects of the adverse impact of the Correctional Officer I examination consists of all black persons who, between March 24, 1972 and the

present, took and failed the Correctional Officer I written examination. The Defendants have contended that there is no subclass because there is no subclass representative who properly can prosecute this adverse impact claim. Although the Court has ruled othewise, it is of the opinion that this determination involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. The parties have agreed, and the Court determines, that the process of giving notice to the subclass and filing individual claims shall go forward even if an appeal is taken, on the basis of this court's certificate, pursuant to 28 U.S.C. Section 1292(b). However, unless otherwise ordered by this Court or by the Court of Appeals, no determination of individual claims shall be made during the pendency of the appeal.

2. The procedure for determination of individual relief may include class-wide mathematical models or formulas, individual hearings or a combination of these and other procedures. A decision as to the most appropriate procedure to implement in this litigation shall be deferred until the number of individual claims and their distribution by time and by geography are known. It is now appropriate to give notice to the subclass and to permit individual claims to be filed. At the conclusion of the period established for filing individual claims, counsel for the parties are directed to report to the Court concerning recommendations for additional procedures to be followed.

3. Notice shall be given by mail, by posting, and by publication.

4. Notice by mail shall be given to all subclass members whose names and last known addresses can be determined from records of the Defendants and from the available records of any other agency of the State of Florida or of the United States. The parties and their counsel are directed to cooperate in the effort to identify subclass members from these records. The Defendants and their counsel are directed to use their good offices to insure that all such records are reasonably accessible to counsel for Plaintiffs, with the intent to minimize or eliminate the need for formal discovery in this process. The Defendants shall be responsible for compiling and maintaining a master list of all subclass members whose names and last known addresses are determined by the means described in this paragraph. In addition, the Defendants shall compile and maintain a "race unknown" list of all persons who, by the means described in this paragraph, can be determined in to have taken and failed the Correctional Officer I written examination, and whose names and addresses can so be determined, but whose race is unknown. Notice by regular mail, with a copy of the claim form, shall be provided to all persons named on the master list and on the "race unknown" list.

5. In the event any notice sent by mail is returned undelivered by the United States Postal Service, an attempt shall be made to determine a more recent or additional address or addresses for the person to whom such notice is directed, using those records described in paragraph "4" and, where appropriate, telephone, city, and other available directories. To the extent such additional addresses are determined, additional notices and claim forms shall be mailed.

6. A form of the notice by mail and of the claim form are attached to this order.

7. The Defendants shall compile a list of all newspapers, periodicals, and other publications used by them in the recruitment of applicants for employment. Plaintiffs may add to this list the names of other publications. Any disagreement as to publications to be listed shall be presented to the Court for resolution.

8. A copy of the notice by publication is attached to this stipulation. This notice shall be placed as an advertisement in the regular news section of each listed publication. In daily newspapers, the advertisement shall be run no fewer than four times, including two Mondays and two Thursdays. In weekly publications, the advertisement shall be run no fewer than two times. In monthly publications, the advertisement shall be run at least once. The size of the advertisement in full-sized newspapers shall be no less than one-quarter of a page. In publications of tabloid or other size, the advertisement shall be not less than one-half page in size. A copy of the advertisement shall also be given to each employee of the Department of Corrections, which may be accomplished by publication, full page, on the outside of either the front or the back cover of the Correctional Compass.

9. The Defendants shall compile a list of all public or private agencies, organizations, and associations to whom notice of Department of Corrections job vacancies are sent or which are otherwise used by the Department in the employee recruitment process. Plaintiffs may add the names of other agencies, organizations, or associations to this list. Any disagreement as to inclusion on this list

shall be presented to the Court for resolution. Copies of the notice by publication, suitable for posting, and of claim forms, shall be sent by the Defendants to each such organization listed with a request that the notices be posted or otherwise made public and that claim forms be given to persons requesting them. Copies of the notice shall also be posted on every bulletin board or other posting place used by the Department of Corrections to disseminate information to employees and/or to applicants for employment. Copies of the claim form shall be placed in all personnel offices of the Department of Corrections.

10. Plaintiffs may prepare a press release concerning the claims procedure and may distribute it to the press. Prior to release, the contents shall be reviewed by the Defendants.

11. The schedule for the giving of notice and filing of claims is:

a. The Defendant shall prepare, serve and file with the Court (i) the initial master list of subclass members and list of examination failees whose race is unknown, compiled in the manner described in paragraph "4", (ii) the list of newspapers, periodicals, and other publications, described in paragraph "7", and (iii) the list of agencies, organizations, and associations, described in paragraph "9", no later than December 6, 1985. Plaintiffs may serve and file lists of additions to the Defendants' respective lists no later than January 10, 1986. If the Defendants object to any of Plaintiffs' additions to items "ii" and "iii", they shall serve and file their objections no later than January 24, 1986.

b. Notices shall be mailed to all persons on the amended master list and "race unknown" list no later than February 14, 1986.

c. Publication of the notice, as described in paragraphs "7" and "8", and delivery of notices and forms, as described in paragraph "9", shall occur during the months of February and March, 1986. However, notices and forms shall be distributed to all personnel offices of the Department of Corrections no later than January 31, 1986.

d. The process of attempting to locate additional addresses with respect to those subclass members whose notices are returned undelivered by the U.S. Postal Service, described in paragraph "5", shall be a continuing one. Defendants are directed to make available sufficient paralegal and clerical staff to perform these tasks during the entire notice period.

e. The last day upon which a claimant may file a claim shall be June 2, 1986. Incomplete claim forms filed on or before that date shall be treated as though they were complete, for the purpose of determining whether the filing deadline has been met, if they provide enough information so that the identity of the claimant may be determined.

f. Upon showing cause, any party may apply to the Court for an extension or modification of this schedule.

12. The cost of giving notice shall be borne by the Defendants.

DONE and ORDERED this 2nd day of October, 1985, at Tallahassee, Florida.

/s/ William Stafford
WILLIAM STAFFORD
Chief Judge

Peners L. GRIFFIN and Henry L. Dejerinett, Plaintiffs-Appellees,

v.

Richard L. DUGGER, etc., et al., Defendants-Appellants.

No. 85-3831.

United States Court of Appeals, Eleventh Circuit.

Aug. 7, 1987.

As Amended Sept. 23, 1987.

Action was brought charging Florida Department of Corrections with discrimination on behalf of class and motion was brought to decertify class. The United States District Court for the Northern District of Florida, No. 79-1016, William Stafford, Chief Judge, denied motion to decertify class and allowed intervention of applicant for employment and appeal was taken. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) incumbent employee could not represent, in civil rights action, class that included applicants, and (2) plaintiff who filed charge with EEOC and non-filing plaintiff were not sufficiently similarly situated to allow intervention under single filing rule.

Vacated.

Hatchett, Circuit Judge, dissented.

Jim Smith, Atty. Gen., Bruce Alexander Minnick, Asst. Attys. Gen., Mitchell D. Franks, Tallahassee, Fla., for defendants-appellants.

Harry L. Witte, Jerry G. Traynham, Tallahassee, Fla., for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

TJOFLAT, Circuit Judge:

I.

In April 1971, Peners L. Griffin became the first black Road Prison Officer at the Tallahassee Road Prison, operated by the Florida Department of Corrections (FDOC or Department). Beginning in 1973, Griffin frequently sought promotion to higher-grade correctional officer positions, as well as various other positions. On each occasion, the FDOC turned him down.

In December 1974, Griffin's supervisor fired him for disciplinary reasons. The next day, the Regional Superintendent reinstated Griffin because the supervisor had not followed proper termination procedures. In early 1975, the FDOC again terminated Griffin's employment, without notice, for disciplinary reasons. He appealed the termination to the State of Florida Career Service Commission. The Commission found no just cause for Griffin's discharge and ordered the FDOC to reinstate him with back pay. The Florida District Court of Appeal affirmed the Commission's decision, and the FDOC reinstated Griffin to his position.

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* Honorable Joe Eaton, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Soon after his reinstatement, Griffin filed a complaint with the FDOC's Equal Employment Opportunity Program Office, charging that his two dismissals were racially discriminatory. An investigator in that office wrote Griffin a month later and informed him of his conclusion that racial discrimination had not been a factor in the dismissals. Within a day or two of having received that letter, Griffin filed a complaint with the Equal Employment Opportunity Commission (EEOC), detailing the events leading up to his allegedly discriminatory discharges. A notation at the beginning of Griffin's complaint, probably made by an EEOC counselor, describes Griffin's allegations of racial discrimination as also encompassing "[s]incerity of recruiting, hiring, and promoting of minority groups within the Florida's Division of Adult Corrections. Specific attention within the Community Service Program."

Griffin asked the EEOC for a right-to-sue letter and received one in July 1979. On October 15, 1979, Griffin brought this action in the district court against Louis L. Wainwright, as Secretary of the FDOC, the FDOC, and the State of Florida. Griffin alleged that the FDOC had denied him several promotions because of his race. He also alleged that the FDOC impermissibly considered race in all of its promotion decisions, as well as in its hiring and job assignment decisons. In hring correctional officers, according to Griffin, the Department used written entry-level examinations having a detrimental impact upon blacks.[1]

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1. The district court found the following facts concerning the FDOC's written entry-level examination: "Every person seek-

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Griffin sued "individually and on behalf of all others similarly situated," pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, seeking declaratory and injunctive relief and money damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976) (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1982)), 42 U.S.C. § 1981 (1976),[2] and 42 U.S.C. § 1983 (1976).[3] The class identified in his complaint was com-

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ing a position as a correctional officer is required to take a written examination. The Department of Administration developed the Correctional Officer I entry level test which consists of seventy-five questions. An applicant must receive a score of at least thirty-eight for employment consideration."

2. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Griffin's complaint stated that his action was brought "pursuant to 42 U.S.C. § 1983, to redress the deprivation of

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posed "of all past, present and potential black American citizens and residents who have been, are or may be employees of the Defendants or applicants for employment."[4]

On June 17, 1980, Griffin obtained leave of court to amend his complaint to add Henry L. Dejerinett as a party-plaintiff and class representative. Dejerinett, who is black, had applied for an FDOC clerical position but was not hired.[5] On March 10, 1981, based on a stipulation between the parties[6] and without a hearing, the district

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the Plaintiff GRIFFIN's property interests in his employment, without due process of law." We assume that Griffin's section 1983 claim also encompassed the theory that the FDOC's conduct amounted to invidious discrimination in violation of the fourteenth amendment's equal protection clause.

4. The claims described in the text were presented in count I of Griffin's complaint, which contained two counts. Count II, which is not pertinent to this appeal, alleged that Griffin was denied due process and equal protection of the law when the FDOC terminated his employment in 1975; Griffin alleged that the FDOC (a) failed to give him notice of the reason for his discharge and an opportunity to be heard before terminating his employment and (2) discharged him because of his race. Count II further alleged that because Chapter 110 of the Florida Statutes, which governs state employment did not require the Department to give him notice, a hearing, or back pay, Chapter 110 was unconstitutional.

5. Dejerinett subsequently filed a timely charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980.

6. The parties stipulated, among other things, that

> [t]he allegations of race discrimination in the . . . Complaint involve questions of law and fact which, under current law in the United States Court of Appeals, Fifth Circuit, are common to the class, including statistical evi-

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court preliminarily certified the case as a class action with Griffin and Dejerinett representing the class of "all past, present, and potential black employees of the State of Florida Department of Corrections."

On June 25, 1982, the defendants filed a "Notice Regarding the Adequacy of the Preliminary Class Certified," which called to the court's attention a Supreme Court decision rendered eleven days previously. That decision, *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), announced the appropriate standards courts should apply when determining class action certifications in the context of a Title VII suit, reversing a former Fifth Circuit decision permitting "across-the-board" class actions that had been binding precedent in the new Eleventh Circuit.[7] On July 8, 1982, the defendants moved the court, in light of *Falcon*, to vacate its order certifying the class.

To avoid the risk that the district court might vacate its order certifying the class, Griffin and Dejerinett took steps to obtain an additional named plaintiff to represent those in the class who had applied for the position of cor-

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dence, evidence concerning the employment system of the State of Florida Department of Corrections, and the common legal principles applied to claims of race discrimination. The parties maintain their right to brief these issues on appeal, if any.

The parties also "reserve[d] the right to move to decertify or limit the class, or to establish subclasses, at any time during the pendency of this litigation."

7. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

rectional officer, failed the written entry-level examination, and not been hired. Accordingly, on July 8, 1982, Alvin Smith, joined by Griffin and Dejerinett, moved the court to intervene as an additional named plaintiff and class representative. In 1980 and 1981, Smith, who is black, applied for the same entry-level position that Griffin held. The FDOC did not hire Smith, because he did not have a high school diploma or a general equivalency diploma (GED), a prerequisite for employment as a correctional officer. Smith later obtained a GED, but when he reapplied with the FDOC in July 1981, he failed the written entry-level correctional officer examination and was again denied the job.[8]

On July 28, 1982, the district court denied the defendants' motion to decertify the class and permitted Smith to intervene[9] because

> Smith, [as] an unsuccessful applicant, certainly has an interest in this suit which seeks to challenge defendants' employment practices, including hiring. Unless he is permitted to intervene, his interest may not be adequately represented by the named parties. Mr. Smith eases this court's concern that the class claim against the [FDOC]'s objective criteria was not

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8. Smith never filed a timely charge of racial discrimination with the EEOC.

9. In its dispositive order, the district court did not address the intervenor's complaint, which was filed with Griffin, Dejerinett, and Smith's joint motion for leave to allow Smith to intervene. Apparently, the court treated the intervenor's complaint as an amendment to Griffin and Dejerinett's complaint because it ordered that the "action shall continue to be certified as a class with PENERS L. GRIFFIN, HENRY L. DEJERINETT, and ALVIN SMITH as named plaintiffs representing a class of all past, present, and potential black employees of the State of Florida Department of Corrections."

> fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees.

As to the defendants' contention that Smith could not be a class representative because he had not timely filed an EEOC complaint, the district court found that the charges of discrimination Griffin had filed with the EEOC included "the hiring claim in addition to promotion, job classification, discipline, and termination claims." The court thus reasoned that the Fifth Circuit's single-filing rule excused Smith from having failed to exhaust his administrative remedies. *See Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir.1968) ("[O]nce an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. . . .").

On July 30, 1982, the district court entered partial summary judgment for the plaintiffs, including Griffin and Dejerinett on the liability issue as to the written entry-level examination.[10] The court found that the FDOC examination "has a disparate impact upon class members which has not been justified by business necessity.' The plaintiffs had sought summary judgment on two other issues—the class hiring and promotion claims—but the court denied summary judgment on those issues because they presented material issues of fact.

A trial was held over the five-week period beginning August 17 and ending September 17, 1982. The court entered judgment on August 25, 1983, disposing of the following issues in favor of the defendants: whether the

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10. The district court said it would consider the issue of relief at trial.

FDOC's policies and practices discriminated against past, present, and potential black employees; whether the FDOC's employment practices as to Peners L. Griffin were racially discriminatory; and whether the FDOC's hiring practices as to Henry L. Dejerinett were racially discriminatory. The court entered judgment for the plaintiffs on the liability issue concerning the correctional officer examination, on which it had previously granted summary judgment for the plaintiffs.[11] The issue of relief for the class of black persons who took and failed the correctional officer written examination is still pending. The parties agreed that notice should be given to the affected members of the class and to seek interlocutory appeal of the district court's decision permitting Griffin, Dejerinett, and Smith to serve as named plaintiffs for a class that included applicants with testing claims. We granted this appeal pursuant to 28 U.S.C. § 1292(b) (1982 & Supp. III 1985). Because we conclude that the district court incorrectly applied the dictates of *Falcon*, we vacate the district court's order certifying the class.

II.

As with any private class action, the legitimacy of a private Title VII suit brought on behalf of a class depends upon the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional stand-

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11. The district court did not render judgment on Griffin's federal due process and equal protection claims or on his pendent state law claim for malicious prosecution (which was first raised in count III of Griffin's first amended complaint). Those claims are still pending in the district court.

ing to raise the claim (or claims) and who has satisfied the procedural requirements of Title VII.[12] Second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be fulfilled; in other words, the individual plaintiff must be qualified to represent the members of the class in accordance with the four prerequisites of Rule 23(a),[13] and the action must be one of the three types Rule 23(b) identifies.[14] We emphasize that any analysis of class cer-

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12. This circuit has held that the conditions precedent to filing a Title VII suit are not jurisdictional, but rather are akin to a statute of limitations. A plaintiff's failure to satisfy the conditions precedent does not, standing alone, deprive federal district courts of subject matter jurisdiction. *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992 (11th Cir.1982). Nevertheless, "a plaintiff must generally allege in his complaint that 'all conditions precedent to the institution of the lawsuit have been fulfilled.' " *Id.* at 1010 (quoting Fed.R.Civ.P. 9(c)).

13. Rule 23(a) provides as follows:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

14. Rule 23(b) provides as follows:

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

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tification must begin with the issue of standing and the procedural requirements of Title VII. Thus, the threshold question is whether the named plaintiffs have individual standing, in the constitutional sense, to raise certain issues. *See Brown v. Sibley,* 650 F.2d 760, 771 (5th Cir. Unit A July 1981) ("This constitutional threshold must be met before any consideration of the typicality or claims or commonality of issues required for procedural reasons by Fed. R.Civ.P. 23."). Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others. *See generally* 2 A. Larson & L. Larson, *Employment Discrimination* §§ 49.50-.51 (1986 & Supp. Nov. 1986).

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(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

A.

Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury. *See Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.) ("To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or that the prospective relief will remove the harm.") (citation omitted), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *Thurston v. Dekle*, 531 F.2d 1264, 1269 (5th Cir.1976) ("The threshold case-or-controversy inquiry is whether there existed a named plaintiff with standing to raise the issue before the court."), *vacated on other grounds*, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978). If he cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear his grievance. This individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which [he] purport[s] to represent." *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975); *see also Minority Police Officers Ass'n v. City of South Bend*, 721 F.2d 197, 202 (7th Cir. 1983) ("Feelings of solidarity do not confer standing to sue."). Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, "even if the persons described in the class definition would have standing themselves to sue." *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); *see also Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1200 (5th Cir.), *cert. denied*, 469 U.S. 1073, 105 S.Ct.

567, 83 L.Ed.2d 507 (1984). A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone—not for himself, and not for any other member of the class. *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Moreover, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. This relationship between standing and the class action has been discussed in some detail by the Supreme Court:

> It is not enough that the conduct of which the plaintiff complains will injure *someone.* The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Blum v. Yaretsky, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982) (citing *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 166-67, 92 S.Ct. 1965, 1968-69, 32 L.Ed. 2d 627 (1972)).

In the case before us, the named plaintiff who initiated the action, Peners L. Griffin,[15] could, and did, allege

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15. Our analysis of the standing and Rule 23 issues presented by this case focuses first on Peners L. Griffin as a sole named plaintiff. We then examine whether the addition of Henry L. Dejerinett and Alvin Smith as named plaintiffs affected the class certification.

injury as a result of the FDOC's discipline and promotion practices: he claimed that on specific occasions the FDOC illegally disciplined him and did not promote him, because of his race.[16] Griffin had standing to assert discipline and promotion claims. Because he had already met the educational and testing requirements of a road prison correctional officer and had been hired for that position, however, he suffered no injury as a result of the FDOC's use of the written entry-level examination. *See Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 898 (5th Cir.) ("[Named p]laintiffs . . . possessed tenth grade educations and therefore lacked [constitutional] standing" to challenge tenth grade education requirement), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Griffin thus lacked constitutional standing to assert a testing claim.[17]

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16. Griffin satisfied the procedural requirements of Title VII, such as filing an EEOC complaint against his employer within 180 days of the alleged discrimination, *see* 42 U.S.C. § 2000e-5(e) (1976), and receiving statutory notice of the right to sue his employer, *see* 42 U.S.C. § 2000e-5(f)(1). *See generally* 42 U.S.C. § 2000e-5 (detailing conditions precedent to a Title VII action).

17. Griffin's complaint alleged that the FDOC had implemented policies and practices of discrimination, including "maintaining a racially biased working environment" and "failing or refusing to recruit, hire, and assign blacks on the same basis as whites." Nothing in the complaint, in the district court's certification orders, or in the record on appeal alleged or established a causal link between the FDOC's allegedly discriminatory testing policy and its allegedly discriminatory work environment or its allegedly discriminatory promotion and discipline practices. Nor is there an allegation or showing in the record that Griffin (or Dejerinett, who had been denied employment by the FDOC) suffered any specific harm

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Accordingly, we hold that the district court erred when it permitted Griffin to raise the testing claim on behalf of himself and on behalf of others. We hold in the alternative that even if Griffin somehow had constitutional standing to assert the testing claim, he did not, in light of *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and

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resulting from the allegedly discriminatory work environment. Thus, Griffin (and Dejerinett) did not establish standing to challenge the FDOC's testing practices. *Cf. Gray v. Greyhound Lines*, 545 F.2d 169, 173-75 (D.C. Cir. 1976), *cited with approval in Meritor Savings Bank v. Vinson*, 477 U.S. 57, —, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986).

Assuming for the sake of argument, that Griffin (or Dejerinett) had established standing to assert a testing claim, we nevertheless believe that under *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the court should not have presumptively held that Griffin satisfied the requirements of Rule 23(a) so as to allow him to represent a class of applicants with testing claims. Griffin's complaint provided "an insufficient basis for concluding that the adjudication of his claim of [a racially discriminatory environment] would require the decision of any common question concerning the failure of [the FDOC] to hire more [black correctional officers]." *See Falcon*, 457 U.S. at 158, 102 S.Ct. at 2371. The record does not identify any questions of law or fact that were common to Griffin's claim of a racially biased working environment and the claims of those who failed the written entry-level correctional officer examination and were not hired. Thus, even if Griffin had standing to litigate his right to a work environment untainted by racial discrimination, he could not, on that basis, represent those with testing claims, because he did not satisfy the requirements of Rule 23(a).

were not hired.[18] In other words, Griffin did not meet the prerequisites of Rule 23(a). We now turn to a discussion of Rule 23(a) and the Supreme Court's interpretation of it in *Falcon*.

B.

In 1969, the former Fifth Circuit decided *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), the first case to sanction a theory that became known as the "across-the-board" approach to Title VII class actions. In that case, a terminated black employee sought to represent a class of black workers and applicants who had hiring, firing, promotion, and working condition claims. The district court restricted the class to include only those black workers who, like the named plaintiff, had been fired. The Fifth Circuit reversed the district court's certification order and announced that broad class treatment was appropriate where the "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class." *Johnson*, 417 F.2d at 1124 (citation omitted). The court said it "is clear from the pleadings that the scope of appellant's suit is an 'across the board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination." *Id.*

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18. In *Falcon*, the Supreme Court granted certiorari for the express purpose of discussing the contours of Rule 23(a). *Falcon*, 457 U.S. at 155, 102 S.Ct. at 2369. The Court did not question, in its opinion, whether the named plaintiff had constitutional standing.

Under the across-the-board theory, many courts liberally read the requirements of Rule 23(a), permitting named plaintiffs to raise claims on behalf of the class that were of a different type than the named plaintiffs' individual claims. These courts reasoned that the employer allegedly discriminated on the basis of a class characteristic, such as race, and that the discrimination allegedly pervaded, in an across-the-board fashion, all of the employer's personnel policies and practices. *See, e.g., Gibson v. Local 40, Int'l Longshoremen's & Warehousemen's Union*, 543 F.2d 1259 (9th Cir. 1976); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); *Rich v. Martin Marietta Corp.*, 522 F.2d 333 (10th Cir.1975); *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir.1975); *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir.), *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973).[19]

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19. Although widely accepted, the across-the-board theory was not universally endorsed. *See, e.g., Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270-71 (10th Cir.1975); *Kinsey v. Legg, Mason & Co.*, 60 F.R.D. 91 (D.D.C.1973), *rev'd on other grounds sub nom, Kinsey v. First Regional Sec., Inc.*, 557 F.2d 830 (D.C.Cir. 1977); *White v. Gates Rubber Co.*, 53 F.R.D. 412 (D.Colo.1971); *Gresham v. Ford Motor Co.*, 53 F.R.D. 105 (N.D.Ga.1970); *Hyatt v. United Aircraft Corp.*, 50 F.R.D. 242 (D.Conn.1970). Moreover, one of the members of the Fifth Circuit panel that first announced the across-the-board approach, Judge Godbold, cautioned in a specially concurring opinion that the approach announced in the majority's opinion was not a replacement for precise pleadings that allow district courts to determine whether the requirements of Rule 23(a) have been satisfied. *See Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125-27 (5th Cir.1969) (Godbold, J., specially concurring). Judge Godbold also observed that "an over-broad framing of the class" may be unfair and harm-

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The Supreme Court repudiated that liberal reading of the class action, and the reasoning underlying it, in *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).[20] In allegations quite similar to those made in Griffin's initial complaint, the named plaintiff in *Falcon* claimed that his employer had denied him promotions because he was a Mexican-American. He also alleged class claims on behalf of all Mexican-American employees of the company who had not been promoted, and all Mexican-American applicants who had not been hired. Without holding an evidentiary hearing, the district court certified a class consisting of those employees and ap-

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ful to the absent class members: "what of the catastrophic consequences if the plaintiff loses and carries the [over-broad] class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?" *Id.* at 1126. Thirteen years later, the Supreme Court favorably discussed Judge Godbold's opinion when it rejected the across-the-board approach. *See General Tel. Co. v. Falcon*, 457 U.S. 147, 160-61, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982).

20. Even before Falcon, the across-the-board approach was placed in doubt by the Supreme Court. In *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405-06, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453 (1977), the Court reversed a broad class certification:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ.Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

plicants at one of the company's facilities. After a trial, the district court found that the employer had not discriminated against the named plaintiff in hiring, but did discriminate against him in its promotion practices. As to the class claims, the court reached the converse conclusion, finding no discrimination in promotion practices, but finding the hiring practices unlawfully discriminatory. On appeal, the Fifth Circuit, using the across-the-board approach, upheld the class certification:

> [The across-the-board rule] permits an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin.

Falcon v. General Tel. Co., 626 F.2d 369, 375 (5th Cir. 1980).

The Supreme Court, on certiorari, began its analysis of the case by reiterating that Title VII does not relieve a private party plaintiff seeking to represent others from meeting the requirements of the class action rule[21]: "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a). These requirements effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Tel. Co. v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 2369-70, 72 L.Ed.2d 740

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21. In contrast, under Title VII, the EEOC may seek relief for groups of employees or applicants without having to comply with the requirements of Rule 23. *General Tel. Co. v. EEOC* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980).

(1982) (citations omitted). Although the Court recognized "that racial discrimination is by definition class discrimination," it said that the mere allegation of racial discrimination cannot answer the questions posed by Rule 23(a) or define the class that may be certified:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Falcon, 457 U.S. at 157, 102 S.Ct. at 2370 (footnote omitted). Thus, evidence that an employee was denied a promotion because of illegal considerations of race will not necessarily justify the additional inference, for example, that the employer has adopted a general policy of racial discrimination that is reflected in the employer's other employment practices, such as hiring and testing. *See Falcon*, 457 U.S. at 158, 192 S.Ct. at 2371. The presumption that general class claims are fairly encompassed within the personal claims of a named plaintiff can, at best, be characterized as tenuous. *Id.* The *Falcon* Court held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Falcon*, 457 U.S. at 160, 102 S.Ct. at 2372. This means that a private Title VII class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161, 102 S.Ct. at 2372.

The district court's error in *Falcon* can be traced to the named plaintiff's complaint, which "provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans." *Id.* at 158, 102 S.Ct. at 2371. Without the benefit of sufficiently specific pleadings or of a hearing that probed beyond the pleadings to answer the required certification questions, *see id.* at 160, 102 S.Ct. at 2372, the district court could do nothing but presume that the named plaintiff's individual promotion claim was typical of other claims that Mexican-American employees and applicants might raise. *Id.* at 158-59, 102 S.Ct. at 2371. In short, a district court must have some way of identifying the questions of law or fact that are common to claims of the named plaintiff and of the class members he seeks to represent. *Id.*

The Supreme Court has thus repudiated the across-the-board theory of Title VII class actions.[22] No longer will one allegation of specific discriminatory treatment be sufficient to sustain a company-wide class action.[23] No

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22. "Although *Falcon* does not eliminate broad-based class actions *per se*, it will be a rare situation indeed that will permit the combining of hiring, promotion, and discharge claims in the same class." 2 A. Larson & L. Larson, *Employment Discrimination* § 49.52(c)(2) (1986).

23. In *Falcon*, 457 U.S. at 159, 102 S.Ct. 2371 (footnote omitted, the Court stated as follows: "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation."

longer will an employee complaining of racial discrimination, for example, in one employment practice necessarily be permitted to represent other employees complaining of racial discrimination in other practices. District courts must not presume that a named plaintiff has satisfied the typicality and commonality requirements of Rule 23(a). In practical terms, this means that, as a general rule, incumbent employees cannot represent a class that includes applicants and that even a general policy of discrimination will not justify a class of both applicants and employees. *See Falcon*, 457 U.S. at 158-59 & n. 15, 102 S.Ct. at 2371 & n. 15.

In footnote fifteen of *Falcon*, the Supreme Court identified exceptions to that general rule. For example, an employee who alleges that he was a victim of a specific discriminatory employment practice may properly represent applicants when the employer used a biased testing procedure to evaluate both applicants and incumbent employees: "a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15. In addition, a general policy of discrimination could justify a class of both applicants and employees "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.*

The situations the Supreme Court identified in footnote fifteen can be thought of as exceptions to the general rule that applicants and incumbent employees cannot share the same class. We emphasize, however, that those situa-

tions are exceptions not because racial discrimination is by definition class discrimination, a necessarily valid proposition underlying the across-the-board rule, *Falcon*, 457 U.S. at 157, 102 S.Ct. at 2370, but because the commonality and typicality requirements of Rule 23(a) can be satisfied.[24] If, after a rigorous analysis, a district court is satisfied that in a case similar to those situations described in footnote fifteen the Rule 23(a) requirements have been met, then it should not hesitate to certify the class. We caution, however, that although district court should give real meaning to *Falcon's* footnote fifteen, that footnote should not be used to defeat the general dictates of *Falcon*. The footnote was not meant to sanction broad class actions that otherwise do not conform to Rule 23(a).

C.

We begin our analysis of whether the requirements of Rule 23(a) have been fulfilled in the case before us by examining Griffin's complaint.[25] The complaint, which

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24. *See* 1 H. Newberg, *Newberg on Class Actions* § 3.17 (2d ed. 1985):

> In the final analysis, through its rulings and examples, *Falcon* instructs that the Rule 23(a) typicality requirement can be satisfied only by a showing of a sufficient interrelationship between the claims of the representative and those of the class, so that an adjudication of the individual claims will necessarily involve the decision of common questions affecting the class.

25. Our analysis takes into account that the district court had considerable discretion in deciding to certify the class. *See, e.g., Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1363 (11th Cir.1984); *Freeman v. Motor Convoy, Inc.*, 700 F.2d 1339, 1347 (11th Cir.1983).

was filed in October 1979, almost three years before *Falcon* was decided, included allegations that the defendants discriminated on the basis of race with their written entry-level examinations and in their hiring, assignment, discipline, and promotion decisions. Griffin's action was brought "on behalf of all past, present and potential black American citizens and residents who have been, are or may be employees of the Defendants or applicants for employment." As to Rule 23(a)'s numerosity requirement, the complaint contains the allegation that the persons in the class "are too numerous to join in this action."[26] The only reference to Griffin's ability to represent that class was this statement: "The Plaintiff can fairly and adequately represent the class." The complaint's only reference to Rule 23(a)'s commonality requirement was this statement: "The conclusory questions of whether there is a general pattern and practice of discrimination by Defendants and the question of whether certain practices constitute illegal job discrimination are common mixed questions of fact and law to the class as a whole." The complaint made no allegation whatsoever that Griffin could meet Rule 23(a)'s additional requirement of typicality.[27]

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26. In his second amended complaint, Griffin made the following numerosity allegation:

> The precise total number of persons in the class is unknown to the Plaintiffs. Plaintiffs allege, on information and belief, that there are more than 1,000 persons in this class. There are many other unknown class members. They are too numerous to join as named Plaintiffs and such joinder is impractical.

27. The first reference to Rule 23(a)'s typicality requirement was in Griffin's second amended complaint, in which he alleged that "the claims of the Plaintiffs are typical of the claims of all other class members."

Without an evidentiary hearing, the district court preliminarily certified the "class of all past, present, and potential black employees" of the FDOC, finding that the requirements of Rule 23(a) had been met. The court's certification ruling was based solely on a stipulation of the parties that under the law of the Fifth Circuit, the named plaintiffs met the commonality requirement of Rule 23(a).[28] The parties further stipulated that "[t]he claims of the named plaintiffs are, under current law in the United States Court of Appeals, Fifth Circuit, similar to those of other members of the proposed class."[29] The parties made no relevant factual stipulations.

Soon after the Supreme Court decided *Falcon*, the defendants moved the district court to vacate the order certifying the class. The parties filed memoranda of law, arguing the applicability of *Falcon*. On the basis of the memoranda, and with no hearing, the district court issued an order denying the defendants' motion. The court's analysis began with the recognition that "[t]he *Falcon* decision mandates that this court carefully examine the requirements of Rule 23(a)."[30] As to the commonality requirement, the district court found the following:

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28. *See supra* note 6.

29. The defendants reserved the right to move the district court to decertify the class. *See supra* note 6.

30. As to the first requirement of Rule 23(a)—"the class is so numerous that joinder of all members is impracticable"—the district court found that "[t]he number of black persons employed by the [FDOC] in February 1981 was 1,346. . . . This number alone, without inquiry as to the number of past and potential black employees, clearly indicates that the class members are too numerous to join."

> Plaintiffs have alleged a common practice and pattern of racial discrimination which affects defendants' hiring, promotion, job classification, disciplinary, and termination decisions. This general discriminatory policy commonly injures all members of the class of past, present, and potential black employees of the Department. Plaintiffs maintain that they will utilize similar statistical data, similar historical background, and the same or similar witnesses to support their allegations of class-wide discrimination. This court is satisfied that the commonality requirement of Rule 23 is met.

The district court found the typicality prerequisite satisfied, but only because Henry L. Dejerinett, a black male who was not hired for a clerical position, had been added as a party-plaintiff and as a class representative. Even so, the court was concerned that Griffin and Dejerinett could not adequately represent those with objective testing claims:

> Plaintiff Griffin certainly can adequately protect the interests of black employees who have claims of discrimination in promotions, job classification, discicipline, and terminations. Plaintiff Dejerinett's claim is somewhat interrelated with the class claims of a discriminatory hiring policy. Plaintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants. The class claim against discriminatory subjective hiring decisions is fairly encompassed in Dejerinett's claim. This court, however, is concerned that the class claim against the Department's objective screening criteria which have a disparate impact upon class members, especially the [FDOC] test, is not

fairly and adequately protected by any of the named plaintiffs.

In that same order, the district court permitted Alvin Smith to intervene as a party plaintiff. Smith was an unsuccessful black applicant for a correctional officer position who had failed the written entry-level correctional officer examination. The court wrote the following in its order: "Mr. Smith eases this court's concern that the class claim against the Department's objective criteria was not fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees."

As to Griffin's capacity to represent the "class of all past, present, and potential black employees" of the FDOC, we hold that, in light of *Falcon*, Griffin's complaint provided an insufficient basis by which the district court could have concluded that Griffin's "claim[s] of discrimination in promotion [and discipline] would require the decision of any common question concerning the failure of [the defendants] to hire more [blacks]." *Falcon*, 457 U.S. at 158, 102 S.Ct. at 2371. In our view, Griffin satisfied neither the commonality nor the typicality requirements of Rule 23(a).[31]

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31. As the Supreme Court noted in *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370 n. 13.

> [the commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

The district court found the commonality requirement satisfied because the "general discriminatory policy" Griffin alleged "commonly injures all members of the class" and that in order "to support their allegations of class-wide discrimination," Griffin would utilze "similar statistical data, similar historical background, and the same or similar witnesses." As to the typicality requirement, the district court found it satisfied because "[p]laintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants."

To us, the district court failed to appreciate the significance of *Falcon*. The district court did not engage in the kind of "rigorous analysis" that we believe the *Falcon* court contemplated. *See Falcon*, 457 U.S. at 161, 102 S.Ct at 2372.

Griffin's initial complaint, relying on the then-valid across-the-board rule, made no factual showing to satisfy the Rule 23(a) requirements. Additionally, the two amended complaints, which included Dejerinett and Smith as named plaintiffs, offered no facts to satisfy the Rule 23(a) requirements. Moreover, the named plaintiffs' "Memorandum in Opposition to Motion to Vacate Order Certifying Class" offered little more than conclusory statements that the named plaintiffs satisfied the Rule 23(a) criteria. *See Nelson v. United States Steel Corp.*, 709 F.2d 675, 680 (11th Cir. 1983) ("[Named plaintiff] was . . . obligated to show, in at least a preliminary fashion,

the required commonality between her claims and those of the putative class.") (citations omitted). Although the plaintiffs asserted that "[w]hether a person impacted by one employment practice may represent other persons impacted 'in the same manner' by another practice need not be reached in this case," they nonetheless tried to take refuge in *Falcon's* footnote fifteen, which states that a class of both applicants and employees could be justified "if the discrimination manifested itself in hiring and promotion practices in the same general fashion." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15. This is the closest the named plaintiffs came to helping the district court conduct a rigorous Rule 23 inquiry. In fact, the plaintiffs, although aware of *Falcon*, continued to rely on the defunct across-the-board rule by citing a former Fifth Circuit case[32] that, in light of *Falcon*, was no longer good law.

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32. In support of its typically argument, the plaintiffs' memorandum of law cited *Hebert v. Monsanto Co.*, 576 F.2d 77, 88 (5th Cir.), *vacated and dismissed for want of jurisdiction*, 580 F.2d 178 (5th Cir.1978) (per curiam):

> Appellee contends that because appellant's claim concerns only the trucking activities of the company and other claimants are from different departments, appellant's claim is neither factually nor legally typical. We recognize, however, that the typicality requirement is not so rigid as to comprehend only similar fact situations. If class actions were limited to factual typicality, class actions under Title VII would be impossible because, except in rare cases, the facts would not be identical. It would be a better test for typicality to consider whether the types of facts or evidence were typical of the class. For example, if all claims, although of different job classifications, depended upon statistical evidence, and the statistics evidenced a policy of discrimination, typically would be satisfied.

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The district court's commonality analysis amounts to nothing more than a presumption that racial discrimination as manifested in various employment practices raises a common question of law or fact. *See Wheeler v. City of Columbus*, 703 F.2d 853, 855 (5th Cir.1983) (per curiam) ("Discrimination in its broadest sense is the only question alleged that is common to [the named plaintiff] and the class she sought to create and represent. Under *Falcon* this is not enough."). The district court's typicality analysis, which presumably is based on *Falcon's* footnote fifteen, is flawed. As we have already discussed, in that footnote the *Falcon* Court identified exceptions to the general rule that employees cannot represent a class that includes applicants, even though the employer's discrimination is manifested in various employment practices. One situation that may justify a class of both applicants and employees is when the discrimination that is manifested in various practices is effected "in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15. The named plaintiffs' assertions notwithstanding, the pleadings demonstrated that any general policy of discrimination that the FDOC may have had did not manifest itself in the same general fashion.

When the Supreme Court used the term "same general fashion," it gave an example: "entirely subjective

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In light of *Falcon*, "general statistical evidence of underrepresentation in the workforce will undoubtedly not suffice to justify a single class covering different types of discrimination such as in hiring promotion, and discharge." 2 A. Larson & L. Larson, *Employment Discrimination* § 49.52(c)(2) (1986) (interpreting footnote 15 of *Falcon*, 457 U.S. at 159, 102 S.Ct. at 2371).

decisionmaking processes." Significant proof that an employer makes both discriminatory hiring and promotion decisions using an entirely subjective decisionmaking process for each employment practice is a manifestation of a general policy of discrimination operating in "the same general fashion." By qualifying "subjective decisionmaking processes" with "entirely," the Court implied that an employer's general policy of discrimination manifested, for example, by an objective hiring practice and by a subjective promotion practice would not be discrimination operating in "the same general fashion" sufficient to justify a class of both applicants and employees.

The FDOC's decisionmaking process for hiring correctional officers is objective: applicants must hold a high school diploma or a general equivalency diploma and must pass the written correctional officer examination. In contrast, the FDOC's decisionmaking process for promoting correctional officers, and other employees, is subjective: applicants for promotion need not hold advanced degrees or pass any additional examinations; correctional officers are promoted on the basis of their performance as viewed by their superiors. The case before us is not one that implicates *Falcon*'s footnote fifteen.

We therefore hold that Griffin, an incumbent correctional officer complaining of a subjective decisionmaking process, could not represent a class that included those who may have been victims of a discriminatory objective decisionmaking process, such as applicants for the position of correctional officer who took the written entry-level examination and failed it. *See, e.g., Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365 (11th Cir.1984) ("Following *Falcon* . . . we hold that [plaintiffs'] complaint provided an

insufficient basis for concluding that the adjudication of [their] claim of discrimination in *hiring* supervisory employees would require the resolution of common questions of law and fact concerning [the employer's] discriminatory practices in *recruitment, job assignment, transfer,* and *promotion.*"); *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1387 (5th Cir.1983) ("Under *Falcon*, plaintiff cannot serve as class representative with respect to hiring, promotion, or any other employment practices excepting discriminatory discharge because she does not possess the same interest and did not suffer the same injury as the other members of the class."); *Taylor v. Block*, 35 Fed.R. Serv.2d (Callaghan) 546 (D.D.C. Oct. 15, 1982) (plaintiffs who alleged they suffered only promotion discrimination could not represent across-the-board class claiming hiring, assignment, and training discrimination). In other words, Griffn, who could assert discipline and promotion claims under Title VII, did not have representative capacity, within the meaning of Rule 23(a), to assert testing claims on behalf of others.[33] We now examine whether the addition of Henry L. Dejernett and Alvin Smith as named plaintiffs affected the class certification question.

III.

A.

Eight months after filing his complaint in district court, Griffin sought leave to amend his complaint to add

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33. Because Griffin satisfied neither the commonality nor the typicality requirements of Rule 23(a), we need not address whether he could have been an adequate representative of the class. *See* Fed.R.Civ.P. 23(a)(4).

Henry L. Dejerinett as a party-plaintiff and as a class representative. In November 1978, Dejerinett applied for an FDOC clerical position, entitled "Property Manager III." Dejerinett was not required, as part of the application process, to produce an educational degree or to take the written entry-level examination required of correctional officer applicants. He was required, however, to have an interview. Dejerinett was not hired; instead, the FDOC hired a white male. A month later, Dejerinett filed a charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980. The district court, with no written analysis of standing or Rule 23, granted Griffin leave to amend his complaint and add Dejerinett as a named plaintiff.

Dejerinett had standing to assert a subjective hiring claim.[34] He applied for a clerical position, requiring no correctional officer examination or educational degrees, and was not hired. Because Dejerinett never took the correctional officer examination, and never applied for that position, he suffered no injury as a result of that test. He thus lacked constitutional standing to assert a testing or a

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34. There is some indication in the record that the Florida Department of Administration, on the basis of testing, training, and experience, rated Dejerinett as well-qualified for the clerk position. We cannot tell from the record whether any testing done by the Department of Administration measured health, physical ability, or intelligence. In any event, because the rating took experience and training into account, there was a substantial subjective component to the rating. We also note that because Dejerinett received a well-qualified rating (which presumably was a reason he was granted an interview), he did not allege that the Department of Administration's rating process illegally discriminated against black applicants.

hiring claim arising out of the FDOC's correctional officer application process.

Accordingly, we hold that the district court erred when it permitted Dejerinett to raise the testing claim on behalf of himself and on behalf of others. We hold in the alternative that even if Dejerinett somehow had constitutional standing to assert the testing claim, he did not, in light of *General Tel. Co. v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired.[35] In other words, Dejerinett did not meet the prerequisites of Rule 23(a).

The district court, in effect, presumed the similarity of hiring claims of those denied clerical positions to hiring claims of those denied correctional officer positions. In our view, applicants who were subjectively denied clerical positions cannot sufficiently identify with other applicants who failed an objective written examination and, on that basis, were not hired for the higher-ranking position of correctional officer. *See Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1364 (11th Cir.1984) ("The [district] court [correctly] reasoned that because [the plaintiffs] were applicants for supervisory positions, they did not sufficiently identify with other applicants for lower level labor jobs or employees complaining of disparate job assignments or pay.") The district court abused its discretion when, in light of *Falcon*, it continued to permit Dejerinett to represent those members of the class who

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35. See *supra* note 18.

took and failed the written entry-level correctional officer examination.

B.

Intervenor Alvin Smith twice applied for the entry-level correctional officer position held by Griffin. Smith was first denied the job because he did not have a high school diploma or a general equivalency diploma (GED), both requirements for the job. Later he obtained a GED, but he then failed the written correctional officer examination. Consequently, he was denied the position a second time.

Smith had constitutional standing to assert a testing claim under Title VII. He could, and did, allege injury as a result of the FDOC's testing requirement: he took and failed the written examination required of entry-level correctional officers. Although Smith may very well have had representative capacity, under Rule 23(a), to assert testing claims on behalf of other black applicants who failed the same test and were consequently not hired, we need not address that point. Smith did not file a timely charge of racial discrimination with the EEOC, a precondition to a Title VII suit. *See* 42 U.S.C. § 2000e-5(e) (1982); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1010-11 (11th Cir.1982); *see also supra* note 12. Furthermore, as we discuss below, Smith could not avail himself of the single-filing rule. For these reasons, we hold that the district court erred when it allowed Smith to intervene as a class representative.

In *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir.1968), our predecessor circuit held that it is not necessary for each person with the same grievance to

file an EEOC charge as a prerequisite to class membership. Nor is it necessary that an intervenor bring a charge with the EEOC as a prerequisite to serving as a class representative. *Id.* As long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members. *Id.*[36]

This rule, which has become known as the "single-filing rule," contains two essential requirements: "First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective. . . . Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." *Jackson*, 678 F.2d at 1011-12. In the case before us, the first requirement was met: Griffin, one of the named plaintiffs, timely filed an adequate EEOC complaint, as far as it detailed his promotion and discipline claims. The second requirement, however, was not satisfied. Smith, a non-filing plaintiff, had an objective testing claim while Griffin, on the other hand, had subjective promotion and discipline claims.

We hold that Griffin and Smith were not sufficiently similarly situated. That is, employee Griffin's claims and applicant Smith's claims did not arise out of similar dis-

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36. The *Oatis* reasoning was extended to intervention in non-class suits in *Wheeler v. American Home Prods. Corp.*, 582 F.2d 891, 897-98 (5th Cir.1977) (similarly situated intervenors who had not filed EEOC charges nevertheless could assert back pay claims if one or more of original plaintiffs had filed timely charges). The *Oatis* rationale was further extended in *Crawford v. United States Steel Corp.*, 660 F.2d 663, 665-66 (5th Cir. Unit B Nov. 1981), which held that every original plaintiff in a multi-plaintiff, non-class action suit need not file charges with the EEOC.

criminatory treatment. Griffin alleged that the FDOC's subjective promotion and discipline practices were illegally discriminatory. Smith alleged that the FDOC's objective correctional officer examination illegally discriminated against black applicants. The FDOC's promotion and discipline practices were not manifested in similar fashion to its hiring and testing practices. *See Ezell v. Mobile Housing Bd.*, 709 F.2d 1376, 1381 (11th Cir.1983) (non-filing incumbent plaintiff's discriminatory examination claim was not sufficiently similar to filing plaintiff's discriminatory discharge and broad-based, ongoing campaign of discrimination claims to invoke single-filing rule to excuse filing requirement); *Dalton v. Employment Sec. Comm'n*, 671 F.2d 835, 838 (4th Cir.), *cert. denied*, 459 U.S. 862, 103 S.Ct. 138, 74 L.Ed.2d 117 (1982) (because non-charging plaintiff's hiring claim was not "substantially identical" to incumbent employee's claims of discrimatory treatment, single-filing rule did not apply). Although both employment practices could have been racially discriminatory, that alone is not enough to implicate the second requirement of the single-filing rule. Otherwise, "intervention [could] bootstrap the court's jurisdiction to encompass claims regarding practices broader than the . . . claims properly assertable by the named plaintiffs." *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1201 (5th Cir.) (former employees who sought to intervene in class action but who did not file timely charges with EEOC could only proceed within periphery of issues that named plaintiffs could assert), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984); *see also Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1246 (7th Cir. 1983) ("[A] class member who does not meet the procedural prerequisites for waging a Title VII suit may not use the guise

of a motion to intervene to take over as the sole class representative for someone who initiates but is not legitimately able to continue a class action.").

We also note that merely because a notation at the beginning of Griffin's EEOC complaint stated that Griffin's charge also encompassed "[s]incerity of recruiting, hiring, and promoting of minority groups within the Florida's Division of Adult Corrections," Smith's status as a class representative was not saved. As the pleadings make clear, Griffin never had constitutional standing to raise a testing or a hiring claim, a fundamental requirement underlying the single-filing rule: "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated." *Oatis*, 398 F.2d at 497.[37] Smith cannot point to Griffin's EEOC charge, which arguably contained a testing claim brought on behalf of others, to excuse his failure to have filed his own testing charge with the EEOC when Griffin did not have standing to raise the testing issue. We cannot permit the single-filing rule to be used to circumvent the constitutional requirement of standing.

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37. By "standing" the *Oatis* court meant "the issues as to which [the employee] is aggrieved," *Oatis*, 398 F.2d at 499, citing Title VII's enforcement provision that requires the EEOC to investigate the charges of a person claiming to be aggrieved, 42 U.S.C. 2000e-5(a). By "standing," the *Oatis* court also meant, even if implicitly, personal injury, that is, constitutional standing. *See id.* at 498-99; *see also Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1200-01 (5th Cir.) (interpreting *Oatis'* single-filing rule as implicating constitutional standing), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984).

IV.

In sum, based on standing principles and on the dictates of *Falcon*, we hold that the district court erred when it certified the class with the named plaintiffs as representatives. None of the named plaintiffs—Griffin, Dejernett, or Smith—should have been allowed to represent the class of black correctional officer applicants with testing claims. The district court's order certifying the class is therefore

VACATED.

HATCHETT, Circuit Judge, dissenting:

I dissent. The majority holds that Smith did not meet the second element of the single-filing rule. That rule states, "the individual *claims* of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." *Jackson*, 678 F.2d at 1011-12 (emphasis added). One of Griffin's claims in his EEOC complaint was that the FDOC discriminated against black job applicants. Non-filing intervenor Smith's claim arose "out of similar discriminatory treatment," because he alleges that the FDOC discriminated against him and other applicants through administration of a test with a discriminatory impact on blacks. The majority ignores the fact that Griffin raised the claim of discrimination against black applicants in his EEOC complaint.

The majority erroneously assumes that if Griffin lacks standing to raise the hiring claim in federal court, then his raising of that claim before the EEOC is somehow ineffective for purposes of the single filing rule. The majority's reasoning is based upon its failure to differentiate between the policy underlying the standing requirement in

federal court and the policy underlying the single filing rule in an EEOC action. The policy underlying the standing requirement is to ensure that a party litigating an issue has a concrete stake in the outcome of the case, and is therefore motivated to vigorously litigate the issues. The policy underlying the EEOC filing requirement is to ensure "that the settlement of grievances be first attempted through the office of the EEOC. . . ." *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1381 (11th Cir.1983); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). The purpose underlying the EEOC filing requirement is therefore to promote the resolution of Title VII claims out of court. The EEOC proceeding is not designed as a way-station on the road to the federal courthouse.

By asserting a hiring grievance in his EEOC complaint, Griffin ensured "that the settlement of [hiring] grievances [would] be first attempted through the office of the EEOC." *Ezell*, 709 F.2d at 1381. The fact that Griffin may not have had standing in federal district court to raise the hiring issue is irrelevant to the fact that his EEOC complaint gave the EEOC an opportunity to settle the hiring grievance before that grievance was sued upon in federal district court. Since Smith's claim in federal district court of discriminatory hiring practices is identical to the claim of discriminatory hiring practices asserted in Griffin's complaint before the EEOC, invoking the single filing rule will not frustrate the purpose of the EEOC filing requirement: to give the EEOC a chance to resolve Title VII claims before they go to court. The fact that Griffin may not have had standing to raise the hiring claim in court is irrelevant to the issue of whether the EEOC has had a chance to resolve that claim before it is taken to court, whether by Griffin, Smith, or anyone else.

In short, the majority has grafted the constitutional standing requirement for parties litigating in federal district court onto the filing requirements for persons alleging Title VII claims before the EEOC. Such a requirement does not, and never has, existed. The majority, however, misinterprets Fifth Circuit dicta to reach just that conclusion. That dicta says, "Once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated." *Oatis*, 398 F.2d at 498. The majority fails to mention that the sole issue in the *Oatis* case was whether a Title VII class action could include in the class persons who had not previously filed charges with the EEOC. The court held that the class could include such persons. The *Oatis* court gave its reasoning for this holding in the sentence immediately preceding the language relied upon by the majority in this case. That sentence states, "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." *Oatis*, 398 F.2d at 498. In short, the court in *Oatis* was not faced with the question of whether an EEOC complainant could effectively file claims with the EEOC even though the complainant would not have standing to assert the claim in federal district court. The majority's application of constitutional standing requirements to the EEOC complainant puts the EEOC in the nonsensical position of having to anticipate how the federal district court will rule on the complainant's standing to litigate various claims if the EEOC does not resolve them. Such a rule will result in the EEOC narrowing its resolution of claims to those which it anticipates the complainant will have standing to sue upon in federal district court, regardless of the ap-

parent existence of the alleged discrimination with respect to other employees or job applicants. Such a situation would hardly further the purpose of the EEOC filing requirement: to resolve Title VII claims out of court.

Title 42 U.S.C. § 2000e-5(b) says:

> Whenever a charge is filed by or on behalf of a person *claiming* to be aggrieved, or by a member of the Commission, alleging that an eployer . . . has engaged in an unlawful employment practice, the Commission *shall* serve a notice of the charge . . . and *shall* make an investigation thereof.

This provision requires the Commission to investigate all charges which a person "claims" to be aggrieved of. In no way does the provision suggest that the Commission is limited to the investigation of claims which the complainant will have standing to bring in a federal court. Any suggeston in *Oatis* of such a requirement is dicta that is in conflict with the intent of the statute that the EEOC resolve "claimed" discrimination out of court. Smith should therefore be allowed to proceed in federal district court as a class representative for the class of applicants who failed the objective test.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-3831

PENERS L. GRIFFIN and
HENRY L. DEJERINETT,

Plaintiffs-Appellees,

versus

RICHARD L. DUGGER, Secretary of the
Florida Department of Corrections, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion 8/7/87, 11 Cir., 198—, —F.2d—).

(OCTOBER 30, 1987)

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges

who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
United States Circuit Judge

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*Honorable Joe Eaton, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs and Intervenors

vs. TCA 79-1016-WS

RICHARD L. DUGGER, etc., et al.,

Defendants.
_____/

MOTION FOR LEAVE TO AMEND COMPLAINT

Pursuant to Rule 15, Federal Rules of Civil Procedure, and the Opinion of the United States Court of Appeals for the Eleventh Circuit, *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), Plaintiffs and Intervenors move for leave to amend the Complaint. Pursuant to General Rule 11 of this Court, the amended complaint, captioned "Third Amended Complaint, Intervenor Smith's Amended Complaint, and Intervenors' Complaint", is filed with this Motion.

The amended pleading responds to the teaching of *Griffin v. Dugger, supra*, by:

1. Setting forth facts which establish Plaintiff Griffin's Article III standing to file his 1975 Charge of Discrimination, which alleged hiring discrimination, and the complaint in this action;

2. As an alternative route to exhaustion of administrative remedies, by setting forth the facts regarding Inter-

venor Smith's filing of his own Charge of Discrimination and receipt of his own Notice of Right to Sue. Smith's Charge and Notice were not before this Court earlier because, under the single filing rule and the orders of this Court regarding class certification, they were previously unnecessary and irrelevant; and

3. As another alternative route to exhaustion of administrative remedies, by setting forth the facts regarding Intervenor Platt's Charge of Discrimination and Notice of Right to Sue.

With respect to Plaintiffs' and Intervenor Butler's claims of disparate impact of subjective factors/disparate treatment tried in this litigation, the amended pleading also conforms to the evidence adduced at trial and to the legal theories advanced regarding that evidence, as provided by Paragraph (b) of Rule 15.

Respectfully Submitted

/s/ Harry L. Witte
Jerry G. Traynham

PATTERSON & TRAYNHAM
P.O. Box 4289
Tallahassee, Florida 32315
(904) 224-9181

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided by U.S. Mail, postage prepaid, to Harry F. Chiles, Assistant Attorney General, The Capitol —Suite 1501, Tallahassee, Florida, 32301, and to Bruce A. Minnick, Esquire, Mang, Rett & Collette, P.A., Suite 749 Barnett Bank Bldg., P.O. Box 11127, Tallahassee, FL 32302-3127, this 10th day of February, 1988.

s/ Harry L. Witte

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs and Intervenors,

vs. TCA 79-1016-WS

RICHARD L. DUGGER, etc., et al.,

Defendants,
_____/

MOTION FOR LEAVE TO AMEND
INTERVENOR SMITH'S COMPLAINT

Pursuant to Rule 15, Federal Rules of Civil Procedure, and the Opinion of the United States Court of Appeals for the Eleventh Circuit, *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), Plaintiffs and Intervenors move for leave to amend Intervenor Smith's Complaint. Pursuant to General Rule 11 of this Court, Intervenor Smith's amended complaint, captioned "Third Amended Complaint, Intervenor Smith's Amended Complaint, and Intervenors' Complaint", is filed with this Motion.

As to Smith, the amended pleading responds to the teaching of *Griffin v. Dugger*, *supra*, by:

1. Setting forth facts which establish Plaintiff Griffin's Article III standing to file his 1975 Charge of Discrimination, which alleged hiring discrimination, and the complaint in this action; and

2. As an alternative route to exhaustion of administrative remedies, by setting forth the facts regarding

Smith's filing of his own Charge of Discrimination and receipt of his own Notice of Right to Sue. Smith's Charge and Notice were not before this Court earlier because, under the single-filing rule and the orders of this Court regarding class certification, they were previously unnecessary and irrelevant.

Respectfully Submitted

/s/ Harry L. Witte
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/s/ Harry L. Witte

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs and Intervenors,

vs. TCA 79-1016-WS

RICHARD L. DUGGER, etc., et al.,

Defendants,

_____/

MOTION TO INTERVENE

Pursuant to Rule 24, Federal Rules of Civil Procedure, and the Opinion of the United States Court of Appeals for the Eleventh Circuit, *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir. 1987), Samuel Platt, David Baber, Romeo Cozart, Marvin Jones and Michael Oyefesobi move to intervene in this action to protect their interests and the interests of the class of all black applicants for employment with the Florida Department of Corrections and its predecessor agencies who, since March 24, 1972, have been denied employment or consideration for employment by reason of their scores on the Correctional Officer written examination.

Intervenors are black persons who have been denied Correctional Officer employment with the Florida Department of Corrections and or its predecessor agencies because of race, on the basis of their scores on the Correctional Officer written examination. They seek to intervene in this action as a matter of right, pursuant to Para-

graph (a) of Rule 24, since they and the class claim an interest in the Defendants' illegal practice of using the Correctional Officer written examination as an employee selection procedure. This Court has ruled that the challenged practice violates Title VII, since the examination has an adverse impact on black applicants and is not validated. Under the decision in *Griffin v. Dugger, supra,* Intervenors and the class are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect their interests.

Pursuant to Paragraph (c) of Rule 24, Intervenors' complaint, captioned "Third Amended Complaint, Intervenor Smith's Amended Complaint, and Intervenors' Complaint," is filed with this Motion. That pleading sets forth the claims regarding the Correction Officer written examination, for which intervention is sought.

Respectfully Submitted

/s/ Harry L. Witte
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ATTORNEYS FOR PLAINTIFFS

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/s/ Harry L. Witte

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs and Intervenors,

vs. TCA 79-1016-WS

RICHARD L. DUGGER, etc., et al.,

Defendants,

_____/

MOTION TO RECERTIFY CLASS
AND
REQUEST FOR EVIDENTIARY HEARING

Pursuant to Rule 23, Federal Rules of Civil Procedure, Plaintiffs and Intervenors move the Court to recertify the class of all black applicants for employment with the Florida Department of Corrections and its predecessor agencies who, since March 24, 1972, have been denied employment or consideration for employment by reason of their scores on the Correctional Officer written examination, with Intervenors Alvin Smith, Samuel Platt, David Baber, Romeo Cozart, Marvin Jones and Michael Oyefesobi as the representative parties.

All requirements of Rule 23 are satisfied:

1. This class is so numerous that joinder of all members is impracticable. More than two thousand (2,000) black applicants have been denied employment, or consideration for employment, by reason of their scores on the Correctional Officer written examination. More than four-

teen hundred (1400) persons have filed claims in this lawsuit for relief from such discriminatory denial of employment.

2. There are questions of law or fact common to this class. The common questions of law involve the application of the principles of disparate impact, enunciated in *Griggs v. Duke Power Co.* and its progeny and in the Uniform Guidelines on Employee Selection Procedures, to the Correctional Officer written examination. The common questions of fact include the disparate impact of the examination and whether its is a valid predictor of job performance and justified by business necessity. These common questions of law and fact have been resolved in favor of the class by the Court's order granting partial summary judgment (Doc. 157).

3. The claims of the representatives of this class are typical of the claims of the class. Intervenors Smith, Platt, Baber, Cozart, Jones and Oyefesobi all have been denied employment because they failed the Correctional Officer written examination. Intervenor Platt also was denied employment because of a subsequent low score on that examination.

4. The representatives of this class will fairly and adequately protect the interests of the class. They have done and continue to do everything possible, within the dramatically changing contours of Title VII law, to protect the interests of this class. In 1982, when *Falcon v. General Telephone Co. of the Southwest* cast doubt upon the ability of the then class representatives to meet the requirements of Rule 23, Intervenor Smith immediately came forward to take up the banner on behalf of this class.

Likewise, when the Court of Appeals vacated the 1982 order certifying the class, Intervenors Platt, Baber, Cozart, Jones and Oyefesobi immediately indicated their desire and ability to assist as class representatives. The class is represented by counsel who are experienced in complex Title VII litigation, and who have made and continue to make every effort in this litigation to weather the unpredictable storms of Title VII law.

5. This class seeks certification pursuant to Rule 23(b)(2) because the Defendants have denied employment to all members of the class on grounds generally applicable to the class, to-wit, the Correctional Officer written examination which has an adverse impact on black applicants, thereby making injunctive relief appropriate.

Request for Evidentiary Hearing

Plaintiffs and Intervenors request an evidentiary hearing on this Motion, to supplement the existing record.

Respectfully Submitted

/s/ Harry L. Witte
Jerry G. Traynham

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

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/s/ Harry L. Witte

No. 87-1281

Supreme Court, U.S.
FILED
MAY 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counsel for Petitioners

*Counsel of Record

No. 87-1281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PENERS L. GRIFFIN, et al.,
Petitioners,

v.

RICHARD L. DUGGER, et al.,
Respondents.

On Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

In their quest to avoid review of the substantive legal issues posed by the petition, the respondents have distorted the factual and procedural record of the proceedings below. In order to insure that consideration of the legal issues raised in the petition is not obscured,

petitioners respond to the most blatant of these misrepresentations.

1. In their introduction, the respondents misstate the thrust of petitioners' argument, as well as the effect of the court of appeals holding. In fact, petitioners plainly do assert the right of Griffin both to charge before the EEOC and to litigate in federal court, his employer's maintenance of a discriminatory working environment, and to show the connection between the employer's hiring policies and the injury he suffers as a result of those policies.

The respondents' formulation ignores the fact that the court of appeals' decision relies upon its holdings that a layman, filing an administrative charge with the Equal Employment Opportunity Commission (EEOC), is required to satisfy the requirements of Article III standing

in order to have that charge investigated and processed by the EEOC, and that Griffin, as an employee, could not challenge hiring discrimination.

2. The respondents' assertion that they did not have a "fair opportunity to litigate the merits of the test below"[1] is without legal or factual foundation.

The respondents had and availed themselves of their full opportunity under Rule 56, F.R. Civ. P., to "litigate the merits of the test" or to show its "job relatedness" or "business necessity". In their response to the motion for summary judgment (R3-120), respondents conceded both that the test had a disparate impact on black applicants[2], and that it had not

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[1] Brief in Opposition, p.9; See also, id., at p.7 n.3.

[2] The exam's disqualification rate for blacks was six times that for whites.

been validated[3], and, acknowledged their burden to show business necessity. Rather than defend the test, however, the respondents claimed that their affirmative action hiring efforts negated its disparate impact.

Nowhere in their response to the Motion for Summary Judgment (R3-120) did respondents contend that the testing issue was not properly before the district court - whether because Griffin lacked standing to raise it or for any other reason. In fact, the respondents later expressly contended that the examination issues had been fully briefed and were "clearly before the Court", thereby

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[3] Respondents argued that the validation study that had been performed was too flawed to be of use to the plaintiffs. Indeed the study showed that the test had a negative validity, in that persons who did well on the test performed relatively poorly on the job, and vice-versa.

making Smith's intervention unnecessary and inappropriate.[4]

3. The respondents' repeated claim that they challenged Griffin's standing to raise hiring issues, including the correctional officer examination, is false. Not once during the pleadings, pretrial motions, discovery, summary judgment proceedings or trial, did respondents assert this defense. Indeed, their litigation posture was quite inconsistent with this assertion.[5]

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[4] Defendants' response to motion to intervene, R4-145-4.

[5] For example, although respondents moved for a protective order (R2-89) limiting discovery, the limitation sought merely to avoid discovery of events occurring prior to 1974, since Griffin's charge was not filed until February of 1975, and was not based on any opposition to the hiring claim. Similarly, a second motion for a protective order (R2-90), filed by the Florida Department of Administration, expressly offered discovery relating to the correctional officer examination.

Before the district court the respondents sought to defeat Smith's post-Falcon intervention by claiming that Griffin adequately represented Smith's interests on the correctional officer hiring claims.

> Not only has Smith failed to show any facts evidencing inadequacy of representation, but also, the record and Smith's own statements refute such a contention. Smith's stated interest in intervening is to "... litigate his (hiring) claims in this action on his own behalf and on behalf of all others similarly situated." Motion, paragraph 6. But Smith also correctly states that "The Plaintiffs have vigorously maintained that the Plaintiff Griffin may properly represent such class members, (applicants) because he has suffered and continues to suffer direct and personal harm by the Defendants' exclusion of other class members (including Smith) from the (DOC's) work force..." Motion, paragraph 5.
>
> In view of the above, Defendants submit that Smith's interests are adequately represented and petitioner is not entitled to intervention as a matter of right pursuant to

> Rule 24(a) Fed. R. Civ. P. (Parenthetical material in respondents' original).

Defendants' response to the motion to intervene. R4-145.

Additionally, in response to the Motion to Certify, (R1-51), respondents merely claimed that the motion was premature, and subsequently entered a stipulation (Petitioner's Appendix 89a) which provided the basis for the district court's order certifying the class.

Contrary to the assertions of the respondents, the stipulation did not "specifically preserve[] their rights to litigate and to appeal the disputed issues of standing. . ." [6] Indeed, the stipulation makes no mention of standing, and suggests that the respondents were more concerned with challenging the merits

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[6] Brief in Opposition to Petition for Writ of Certiorari, p. 5.

of Griffin's claims, than their classwide applicability.[7]

4. Finally, the respondents' assertions that "since Smith had waited a year to file his charge, the EEOC dismissed it for lack of jurisdiction"[8], and that "In effect, petitioners have asked this Court to overrule the EEOC's 1982 determination that Smith's charge was untimely filed"[9], are totally false.

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[7] The Stipulation (See Petitioners' Appendix 89a, 91a) reads in pertinent part:

> "4. The claims of the named plaintiffs are, under current law in the United States Court of Appeals, Fifth Circuit, similar to those of other members of the proposed class. The parties maintain their right to brief these issues on appeal, if any. The Defendants believe that the employment record of the Plaintiff Griffin is not typical, but recognize that this issue relates to the merits of the claim rather than to the existence of the claim".

[8] Brief in Opposition, p.21.

[9] Id.

There is nothing in or out of the record to support this assertion. The EEOC made no such determination, and in fact issued Smith a right to sue letter.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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